

No. 14653

United States
Court of Appeals
for the Ninth Circuit

BANK OF FAIRBANKS, a corporation,
Appellant,

vs.

A. L. KAYE, JEAN KAYE and JOSEPHINE
BOUSSARD, Appellees.

Transcript of Record

Appeal from the District Court for the District of Alaska,
Fourth Division

FILED

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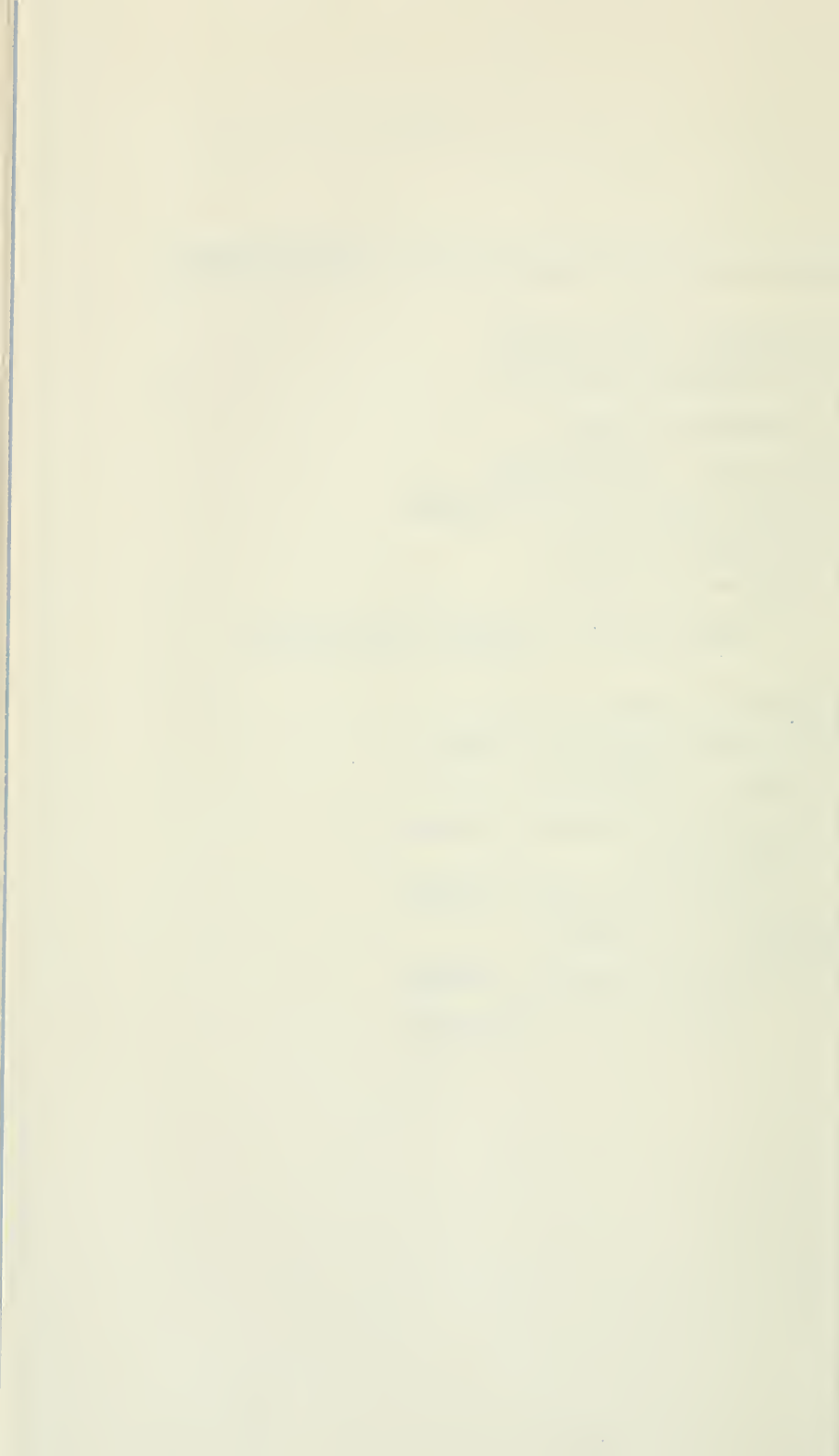
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In the District Court for the District of Alaska,
Fourth Division

No. 7114

BANK OF FAIRBANKS, an Alaskan Banking
Corporation, Plaintiff,

vs.

A. L. KAYE, JEAN KAYE and JOSEPHINE
BOUSSARD, Defendants.

COMPLAINT

Now Comes the Plaintiff above-named and complains of the Defendants above-named and for a first cause of action alleges as follows:

I.

That at all times mentioned in this Complaint, the Plaintiff was and is now a corporation duly organized and existing under and by virtue of the laws of the Territory of Alaska, and that said corporation has filed its annual report last due and has paid its corporation tax last due to the Territory of Alaska.

II.

That on the 8th day of May, 1945, at the City of Fairbanks, Fourth Judicial Division, Territory of Alaska, the Defendants A. L. Kaye and Jean Kaye made and delivered to the Plaintiff their promissory note in words and figures as follows, to-wit:

\$10,000.00

"Mortgage Note

Fairbanks, Alaska, May 8, 1945. No. M-39

For value received, I promise to pay to the order of Bank of Fairbanks, at Fairbanks, Alaska, Ten thousand and no/100ths Dollars with interest from date at the rate of (8) eight per cent per annum until this note is fully paid. Principal payable \$300.00 per month on the 8th day of each month, beginning June 8, 1945, beginning, and continuing until this note is paid in full.

The amount of interest due on this note is to be paid at the same time the principal installments are paid. If any of such installments of principal or interest is not paid when due, the whole sum of principal and interest shall at the option of the holder and without demand become immediately due and payable. Principal and interest are payable only in Legal Currency of the United States of America. For value received each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment, binds himself hereon as a principal, not as surety, and promises, if this note is not paid when due and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection including reasonable attorney's fees, and agrees that at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division, of Alaska.

/s/ A. L. Kaye

/s/ Jean Kaye

Security: Real Estate Mortgage"

III.

That the said Defendants A. L. Kaye and Jean Kaye, to secure the payment of said principal sum and interest thereon as mentioned in said note, according to the tenor thereof, executed and delivered to the Plaintiff a certain real and chattel mortgage bearing date of May 8th, 1945, and conditioned for the payment of the sum of \$10,000.00 and interest thereon at the rate and at the time and in the manner specified in said note and according to the conditions thereof; that said Mortgage was duly acknowledged and certified sufficient to entitled it to be recorded as a real mortgage and filed as a chattel mortgage, and that the same was afterwards, to-wit, on the 9th day of May, 1945, duly recorded in the Recorder's Office of Fairbanks Recording Precinct, Fourth Judicial Division, Territory of Alaska, in Volume 14 of Real Mortgages, as Instrument No. 97368, and was duly filed on the 9th day of May, 1945, in the Recorder's Office of said Fairbanks Recording Precinct, as a Chattel Mortgage, in Volume 5 of Chattel Mortgages, as Instrument No. 97369.

A copy of the said Real and Chattel Mortgage, with the endorsements thereon, is attached hereto and marked Exhibit "A" and made a part of this Complaint.

IV.

That no part of the principal sum mentioned in said note and mortgage has been paid except the sum of \$9,100.00, leaving a balance due on principal in the sum of \$900.00, and that the interest

has been paid to October 8th, 1951, and that therefore there is now a balance due of \$900.00 in principal, together with interest at the rate of 8% per annum from October 8th, 1951.

V.

That it has become necessary for the Plaintiff to employ counsel to prosecute this action and to foreclose the said mortgage, and that the Plaintiff should be allowed a reasonable sum for attorney's fees herein.

VI.

That the Plaintiff is now the lawful owner and holder of said promissory note and real and chattel mortgage.

VII.

That the Defendant, Josephine Boussard, has, or claims to have, some interest or claim upon said premises or some part thereof, as purchaser, mortgagee, judgment creditor, lien claimant, or otherwise, which interest or claim is subsequent to and subject to the lien of the Plaintiff's mortgage herein.

and

As a second cause of action against the Defendants, above-named, and each of them, Plaintiff complains and alleges as follows:

I.

That at all times mentioned in this Complaint, the Plaintiff was, and is now, a corporation duly organized and existing under and by virtue of the

laws of the Territory of Alaska, and that said corporation has filed its annual report last due and has paid its corporation tax last due to the Territory of Alaska.

II.

That on the 22nd day of November, 1948, at the City of Fairbanks, Fourth Judicial Division, Territory of Alaska, the Defendants A. L. Kaye and Jean Kaye by A. L. Kaye her Attorney in Fact, made and delivered to the Plaintiff their promissory note in words and figures as follows, to-wit:

“Mortgage Note

\$6,300.00

Fairbanks, Alaska. 22 Nov., 1948. No. M180

For value received, I promise to pay to order of Bank of Fairbanks, at its office in the City of Fairbanks, Alaska, Six Thousand Three Hundred and no/100ths Dollars with interest from date at the rate of (8) eight per cent per annum until this note is fully paid. Principal payable \$500.00 per month on the 22nd day of each month, beginning 22 December, 1948, and continuing until this note is paid in full.

The amount of interest due on this note is to be paid at the same time the principal installments are paid. If any of such installments of principal or interest is not paid when due, the whole sum of principal and interest shall at the option of the holder become immediately due and payable. Principal and interest are payable only in Legal Currency of the United States of America. For value

received each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment binds himself hereon as a principal, not as surety, and promises, if this note is not paid at maturity and is placed in the hands of an attorney for collection or suit is brought hereon, to pay all costs of collection including reasonable attorney's fees, and agrees that at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division of Alaska.

Security: Mortgage. Address: Box 550.

/s/ A. L. Kaye

/s/ Jean Kaye by A. L. Kaye,
Attorney in Fact"

III.

That the said Defendants A. L. Kaye and Jean Kaye by A. L. Kaye her attorney in fact, to secure the payment of said principal sum and interest thereon as mentioned in said note, according to the tenor thereof, executed and delivered to the Plaintiff a certain real and chattel mortgage bearing date of November 22nd, 1948, and conditioned for the payment of the sum of \$6,300.00 and interest thereon at the rate and at the time and in the manner specified in said note and according to the conditions thereof; that said mortgage was duly acknowledged and certified sufficient to entitle it to be recorded as a real mortgage and filed as a chattel mortgage, and that the same was afterwards, to-wit,

On the 8th day of December, 1948, duly recorded in the Office of the Recorder for Fairbanks Recording Precinct, Fourth Judicial Division, Territory of Alaska, in Volume 17 of Real Mortgages, as Instrument No. 110,949, and was duly filed on the 8th day of December, 1948, in the Recorder's Office of said Precinct, as a Chattel Mortgage, in Volume 6 of Chattel Mortgages, as Instrument No. 110,950. A copy of the said Real and Chattel Mortgage, with the endorsements thereon, is attached hereto and marked Exhibit "B" and made a part of this Complaint.

IV.

That no part of the principal sum mentioned in said note and mortgage has been paid except the sum of \$2,200.00, leaving a balance of \$4,100.00 due on principal, and that the interest has been paid to October 8th, 1951, and that therefore there is now a balance due of \$4,100.00 in principal, together with interest at the rate of 8% per annum from October 8th, 1952.

V.

That it has become necessary for the Plaintiff to employ counsel to prosecute this action and to foreclose the said mortgage, and that the Plaintiff should be allowed a reasonable sum for attorney's fees herein.

VI.

That the Plaintiff is now the lawful owner and holder of said promissory note and real and chattel mortgage.

VII.

That the Defendant, Josephine Boussard, has, or claims to have, some interest or claim upon said premises or some part thereof, as purchaser, mortgagee, judgment creditor, lien claimant, or otherwise, which interest or claim is subsequent to and subject to the lien of the Plaintiff's mortgage herein.

and

As a third cause of action against the Defendants above-named, and each of them, Plaintiff complains and alleges as follows:

I.

That at all times mentioned in this Complaint, the Plaintiff was, and is now, a corporation duly organized and existing under and by virtue of the laws of the Territory of Alaska, and that said corporation has filed its annual report last due and has paid its corporation tax last due to the Territory of Alaska.

II.

That on the 30th day of January, 1950, at the City of Fairbanks, Fourth Judicial Division, Territory of Alaska, the Defendants A. L. Kaye and Jean Kaye made and delivered to the Plaintiff their promissory note in words and figures as follows, to-wit:

“Mortgage Note

5,000.00

Fairbanks, Alaska, January 30, 1950. No. M-422

1,000.00 on or before December 1, 1950

4,000.00 on or before December 31, 1950, after date, for value received, I promise to pay to the order of Bank of Fairbanks, at its office in the City of Fairbanks, Alaska, Five Thousand and no/100ths Dollars with interest from date at the rate of (8) eight per cent per annum, payable quarterly and at maturity, until paid. If interest is not paid when due, or if principal is not paid at maturity, then the interest and principal to draw interest from maturity hereof until paid, at the rate of eight per cent per annum. If default be made in the payment of any installment of interest when due then the whole of this note, both principal and interest, shall forthwith become due and payable without demand at the option of the holder of the note. Principal and interest are payable only in Legal Currency of the United States of America. For value received, each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment, any release or discharge arising from any extension of time, discharge of a prior party, or from any cause other than actual payment in full hereof, binds himself hereon as a principal, not as a surety, and promises, if this note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection, including rea-

sonable attorney's fees, and agrees that, at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division of Alaska.

/s/ A. L. Kaye

/s/ Jean Kaye

Address: Box 555. Security: Real and Chattel on home."

III.

That the said Defendants A. L. Kaye and Jean Kaye, to secure the payment of said principal sum and interest thereon as mentioned in said note, according to the tenor thereof, executed and delivered to the Plaintiff a certain real and chattel mortgage bearing date of January 30th, 1950, and conditioned for the payment of the sum of \$5,000.00 and interest thereon at the rate and at the time and in the manner specified in said note and according to the conditions thereof; that said Mortgage was duly acknowledged and certified sufficient to entitle it to be recorded as a real mortgage and filed as a chattel mortgage, and that the same was afterwards, to-wit, on the 2nd day of February, 1950, duly recorded in the Recorder's Office of Fairbanks Recording Precinct, Fourth Judicial Division, Territory of Alaska, in Volume 21 of Real Mortgages, as Instrument No. 116,646, and was duly filed as a Chattel Mortgage on the 9th day of May, 1945, in the Recorder's Office for said Fairbanks Precinct, as Instrument No. 116,647, in Volume 6 of Chattel Mortgages. A copy of the said Real and Chattel

Mortgage, with the endorsements thereon, is attached hereto and marked Exhibit "C" and made a part of this Complaint.

IV.

That no part of the principal sum mentioned in said note and mortgage has been paid, and that the interest has been paid to October 8th, 1951, and that therefore there is now a balance due and owing of \$5,000.00 in principal, together with interest at the rate of 8% per annum from October 8th, 1951.

V.

That it has become necessary for the Plaintiff to employ counsel to prosecute this action and to foreclose the said mortgage, and that the Plaintiff should be allowed a reasonable sum for attorney's fees herein.

VI.

That the Plaintiff is now the lawful owner and holder of said promissory note and real and chattel mortgage.

VII.

That the Defendant, Josephine Boussard, has, or claims to have, some interest or claim upon said premises or some part thereof, as purchaser, mortgagee, judgment creditor, lien claimant, or otherwise, which interest or claim is subsequent to and subject to the lien of the Plaintiff's mortgage herein.

and

As a fourth cause of action against the Defendants, and each of them, Plaintiff complains and alleges as follows:

I.

That at all times mentioned in this Complaint, the Plaintiff was, and is now, a corporation duly organized and existing under and by virtue of the laws of the Territory of Alaska, and that said corporation has filed its annual report last due and has paid its corporation tax last due to the Territory of Alaska.

II.

That on the 3rd day of February, 1951, at the City Fairbanks, Fourth Judicial Division, Territory of Alaska, the Defendants A. L. Kaye and Jean Kaye by A. L. Kaye her attorney in fact, made and delivered to the Plaintiff their promissory note in words and figures as follows, to-wit:

“Mortgage Note

\$5,000.00

Fairbanks, Alaska, February 3, 1951. No. M-483

On or before one year after date, for value received, I promise to pay to the order of Bank of Fairbanks, at its office in the City of Fairbanks, Alaska, Five Thousand and no/100ths Dollars with interest from date at the rate of (8) eight per cent per annum, payable quarterly and at maturity, until paid. If interest is not paid when due, or if principal is not paid at maturity, then the interest and principal to draw interest from maturity hereof until paid, at the rate of eight per cent per annum. If default be made in the payment of any installment of interest when due then the whole of this note, both principal and interest, shall forthwith

become due and payable without demand at the option of the holder of the note. Principal and interest are payable only in Legal Currency of the United States of America. For value received, each and every party signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment, any release or discharge arising from any extension of time, discharge of a prior party, or from any cause other than actual payment in full hereof, binds himself hereon as a principal, not as a surety, and promises, if this note is not paid at maturity and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection, including reasonable attorney's fees, and agrees that, at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division of Alaska.

/s/ A. L. Kaye

/s/ Jean Kaye by A. L. Kaye,
Attorney in Fact

Security: Real and Chattel Mortgage.”

III.

That the said Defendants A. L. Kaye and Jean Kaye by A. L. Kaye her attorney in fact, to secure the payment of said principal sum and interest thereon as mentioned in said note, according to the tenor thereof, executed and delivered to the Plaintiff a certain real and chattel mortgage bearing date of February 3rd, 1951, and conditioned for the payment of the sum of \$5,000.00 and interest

thereon at the rate and at the time and in the manner specified in said note and according to the conditions thereof; that said Mortgage was duly acknowledged and certified sufficient to entitle it to be recorded as a real mortgage and filed as a chattel mortgage, and that the same was afterwards, to-wit, on the 5th day of February, 1951, duly recorded in the Office of the Recorder for Fairbanks Recording Precinct, Fourth Judicial Division, Territory of Alaska, in Volume 25 of Real Mortgages as Instrument No. 122,228, and was duly filed as a Chattel Mortgage in the Office of the Recorder for said Fairbanks Recording Precinct, on the 5th day of February, 1951, as Instrument No. 122,229 in Volume 7 of Chattel Mortgages, a copy of which mortgage is attached hereto and marked Exhibit "D" and made a part of this Complaint.

IV.

That no part of the principal sum mentioned in said note and mortgage has been paid except the sum of \$2,011.91, leaving a balance of \$2,988.09 due on principal, and that the interest has been paid to April 8th, 1952, and that therefore there is now a balance due of \$2,988.09 in principal, together with interest at the rate of 8% per annum from April 8th, 1952.

V.

That it has become necessary for the Plaintiff to employ counsel to prosecute this action and foreclose the said mortgage, and that the Plaintiff

ould be allowed a reasonable sum for attorney's fees herein.

VI.

That the Plaintiff is now the lawful owner and holder of said promissory note and real and chattel mortgage.

VII.

That the Defendant, Josephine Boussard, has, or claims to have, some interest or claim upon said premises or some part thereof, as purchaser, mortgagee, judgment creditor, lien claimant, or otherwise, which interest or claim is subsequent to and subject to the lien of the Plaintiff's mortgage herein.

Wherefore, the Plaintiff prays judgment against the said Defendants A. L. Kaye and Jean Kaye, and each of them, as follows:

1. On its first cause of action, for the sum of \$900.00, together with interest at 8% per annum from the 8th day of October, 1951.
2. On its second cause of action, for the sum of \$4,100.00, together with interest at 8% per annum from the 8th day of October, 1951.
3. On its third cause of action, for the sum of \$5,000.00, together with interest at 8% per annum from the 8th day of October, 1951.
4. On its fourth cause of action, for the sum of \$2,988.09, together with interest at 8% per annum from the 8th day of April, 1952.
5. For the sum of \$1,500.00 as and for Plaintiff's reasonable attorneys' fees herein, and for its costs and disbursements herein.

6. That it be adjudged and decreed that the Real and Chattel Mortgages hereinabove referred to be foreclosed and that the usual decree may be made for the sale of said premises by the United States Marshal of the Fourth Judicial Division, Territory of Alaska, or by any deputy Marshal thereof, according to law and the practice of this Court; that the proceeds of said sale may be applied in payment of the amounts due the Plaintiff hereunder, and that said Defendants A. L. Kaye and Jean Kaye, and all persons claiming under them subsequent to the execution of said real and chattel mortgages upon said property, either as purchasers, encumbrancers, or otherwise, may be barred and foreclosed of all rights, claim, or equity of redemption in said property, and every part thereof and that the said Plaintiff may have judgment, and execution against the said Defendants A. L. Kaye and Jean Kaye, for any deficiency which may remain after applying all the proceeds of the sale of said premises properly applicable to the satisfaction of said judgment.

7. That the Plaintiff, or any other party to the suit, may become a purchaser at such sale or sales; that the purchaser be let into possession of the property, and that the Plaintiff may have such other and further relief in the premises as to this court may seem meet and equitable.

BANK OF FAIRBANKS,

/s/ By R. C. BAILEY,
Vice President

MAURICE T. JOHNSON and
HUBERT A. GILBERT,

/s/ By MAURICE T. JOHNSON,
Attorneys for Plaintiff

Duly Verified.

EXHIBIT "A"

Mortgage—Real Chattel
(Copy)

This Agreement, Made this 8th day of May, 1945
by and between A. L. Kaye and Jean Kaye his wife
parties of the first part, hereinafter called mort-
gagors and Bank of Fairbanks party of the second
part, hereinafter called mortgagee;

Witnesseth:

That said parties of the first part, for and in
consideration of the sum of Ten Thousand Dollars
and no/100 (\$10,000.00) Dollars, lawful money of
the United States to us in hand paid, receipt
whereof being hereby acknowledged, have granted,
sold and conveyed, and by these presents do grant,
sell, and convey unto the party of the second part,
the following described property, to-wit:

Real and personal property situate in the Town-
site of Fairbanks, Fairbanks Precinct, Territory of
Alaska, to-wit: Those certain portions of Lots Two
(2) and Three (3) in Block Ninety-six (96), ac-
cording to the official plat of said Townsite of Fair-
banks, more particularly described as follows: Com-
mencing at a point on the North end line of said
Lot three on Seventh Avenue in the Town of Fair-
banks, which said point is 55 feet from the North-

west corner of said Lot Three; thence East along the North end line of said Lot 65.1 feet to the Northeast corner thereof; thence continuing East along the North end line of said Lot Two 10 feet; thence South 79.25 feet along a line parallel to the West side line of said Lot 2; thence West along a line parallel to the North end line of said Lot Two 10 feet to the East side line of said Lot Three; thence South along said East side line of Lot Three 79.25 feet to the Southeast corner thereof on Eighth Avenue; thence West along the South end line of said Lot Three to a point which is 55 feet from the Southwest corner of said lot; thence North along a line parallel to the West side line of said Lot Three to the point of beginning; together with all buildings and improvements situate thereon and the contents of said buildings, including all furniture, fixtures, carpets and utensils in the house on the above described property.

To have and to Hold said property, by way of mortgage, to secure the payment of Ten Thousand and no/100 (\$10,000.00) Dollars, lawful money of the United States, and interest thereon, according to the terms of a certain promissory note of even date herewith, a full, true, and correct copy of said note, the original of which is now in the possession of mortgagee, being hereto attached and by this reference made a part of this agreement as if rewritten herein.

If said note is well and truly paid, with interest thereon, according to all its terms and conditions this mortgage shall be void; if not so paid the

holder of said note may foreclose this mortgage according to law. Until some default on the part of the mortgagors, shall be entitled to the use and possession of mortgaged property and to the rents, issues, and profits thereof.

During the life of this agreement, Mortgagors shall keep mortgaged property insured against loss by fire in an equal amount to unpaid balance due for principal and interest on said note, having said policies of insurance made payable to mortgagor as its interest may appear, and depositing same with the mortgagee for safe keeping.

The Mortgagors shall pay all taxes levied against mortgaged property or other liens when due, but if they fail to do so, and the mortgagee is obliged to pay any such item, to protect the lien herein acquired, any such sum so paid by the mortgagee shall be added to the principal debt, and bear interest likewise, and be secured by this mortgage.

Time is of the essence of this agreement and binds the heirs, executors, administrators and assigns of the mortgagors.

In Witness Whereof, the mortgagors have hereunto set their hand and seal at Fairbanks, Alaska, this 8th day of May, 1945.

[Seal] /s/ A. L. Kaye

[Seal] /s/ Jean Kaye

Executed in the presence of:

/s/ Mildred Seeliger

/s/ Carol H. Pomeroy

United States of America,
Territory of Alaska—ss.

This is to certify that before me, this day, appeared A. L. Kaye and Jean Kaye his wife who are known to me to be the identical persons who subscribed their names to the within mortgage and each acknowledged before me that they executed said agreement freely and voluntarily.

In testimony whereof, I have hereunto set my hand and affixed my seal at Fairbanks, Alaska, thisday of May A. D. 1945.

[Seal] /s/ Sylvia Lavery,
Notary Public in and for Alaska

(Chattel Affidavit)

United States of America,
Territory of Alaska—ss.

A. L. Kaye and Jean Kaye, husband and wife, being first severally, duly sworn, on oath, depose and say:

A. L. Kaye and Jean Kaye (says) I am the mortgagor (or one of them) named in the within mortgage.

P. A. Johnson (says) I am the Cashier of Bank of Fairbanks, Mortgagee.

Both say, that the foregoing chattel mortgage is made in good faith, to secure the payment of the sum of money therein named, which is a bona fide existing debt due the mortgagee from the mortgagors and that same is not intended to hinder,

delay, or defraud any creditor or creditors of the mortgagor.

/s/ A. L. Kaye

/s/ Jean Kaye

/s/ P. A. Johnson

Subscribed and sworn to before me this...day of May, 1945.

[Seal] /s/ Sylvia Lavery,
Notary Public in and for Alaska

Mortgage Note

\$10,000.00

Fairbanks, Alaska, May 8, 1945. No. M-39

For value received, I promise to pay to the order of Bank of Fairbanks, at Fairbanks, Alaska, Ten thousand and no/100ths Dollars with interest from date at the rate of (8) eight per cent per annum until this note is fully paid. Principal payable \$300.00 per month on the 8th day of each month, beginning June 8, 1945, beginning, and continuing until this note is paid in full.

The amount of interest due on this note is to be paid at the same time the principal installments are paid. If any of such installments of principal or interest is not paid when due, the whole sum of principal and interest shall at the option of the holder and without demand become immediately due and payable. Principal and interest are payable only in Legal Currency of the United States of America. For value received each and every party

signing or endorsing this note hereby waives presentment, demand, protest, and notice of non-payment, binds himself hereon as a principal, not as surety and promises, if this note is not paid when due and is placed in the hands of an attorney for collection, or suit is brought hereon, to pay all costs of collection including reasonable attorney's fees, and agrees that at the option of the holder hereof, the venue of said suit may be laid in the Fourth Judicial Division, of Alaska.

/s/ A. L. Kaye

/s/ Jean Kaye

Security: Real Estate Mortgage. Address.....

EXHIBIT "B"

Mortgage

This Indenture, Made this 22nd day of November, 1948, by and between A. L. Kaye and Jean Kaye, his wife, of Fairbanks, Alaska, Mortgagors, and the Bank of Fairbanks, an Alaska Corporation, Mortgagee,

Witnesseth:

That said Mortgagors for and in consideration of the sum of six thousand three hundred and no/100ths (\$6,300.00) dollars lawful money of the United States of America, to them in hand paid by Mortgagee, the receipt whereof is hereby acknowledged do by these presents grant, bargain, sell, convey, and confirm unto said Mortgagee, its successors and assigns, forever, the following de-

described real and personal property situate in Fairbanks precinct, Alaska, to-wit:

Those certain portions of Lots Two (2) and Three (3) in Block Ninety-six (96) according to the official plat of said Townsite of Fairbanks, more particularly described as follows: Commencing at a point on the North end line of said Lot Three on Seventh Avenue in the Town of Fairbanks which said point is 55 ft. from the Northwest corner of said Lot three; thence east along the North end line of said Lot 65.1 ft. to the Northeast corner thereof; thence continuing East along the North end line of said Lot Two 10 ft.; thence South 79.25 ft. along a line parallel to the West side line of said Lot Two; thence West along a line parallel to the North end line of said Lot Two 10 ft. to the East side line of said Lot Three; thence South along said East side line of Lot Three 79.25 ft. to the Southeast corner thereof on Eighth Ave.; thence West along the South end line of said Lot Three to a point which is 55 ft. from the Southwest corner of said lot; thence North along a line parallel to the West side line of said Lot Three to the point of beginning; together with all buildings and improvements situate thereon and contents of said buildings including all furniture, fixtures, carpets, appliances and utensils in the house on the above-described property. All of the above property is subject to a mortgage dated May 8, 1945 to the above mortgagee on which the unpaid balance this date is \$3,400.00, and a mortgage dated July 22, 1946 to the above

Mortgagee on which the unpaid balance this date is \$300.00 both made by the above-mortgagors.

Together with all improvements located thereon including stoves and furniture of every sort.

To Have And To Hold, all and singular, said real and personal property unto said Mortgagee, its successors and assigns forever.

This Conveyance, however, is intended as a mortgage to secure the payment to Mortgagee by the Mortgagors of the sum of Six thousand three hundred and no/100ths Dollars, together with interest thereon at the rate of eight per cent per annum from this date until paid, in lawful money of the United States of America, which said amount said Mortgagors hereby promise and agree to pay to said mortgagee according to the terms and conditions of one certain promissory note dated 22 November, 1948, in the amount of \$6,300.00, bearing interest at the rate of eight per cent per annum of which the mortgagors are the makers according to the terms thereof.

And these presents shall be void if the principal and interest of said notes are paid as therein specified and if all the terms and conditions of this mortgage are fully complied with, otherwise to be and remain in full force and effect.

Mortgagors hereby covenant and agree to and with said Mortgagee that they are true and lawful owners of the real and personal property herein mortgaged and that the same is free and clear of all liens and encumbrances, and that they warrant and

will forever defend the title thereto, subject, however, to the two mortgages described above.

Mortgagors further covenant and agree that, during the life hereof, they will pay all taxes and assessments that are now or may hereafter be levied against said real and personal property, and will keep said mortgaged property free and clear of all liens of laborers and materialmen, and will insure said building above described and the contents hereof in a reliable insurance company against loss by fire in a sum not less than the unpaid balance of the principal amount of said promissory note, and will assign and deliver said policies to Mortgagee so that the loss, if any, will be paid to Mortgagee as its interest may appear, and in the event of their failure to do so, Mortgagee may pay such taxes and assessments, and may pay and discharge any and all liens filed against said mortgaged property, and may place such insurance and pay the premiums thereon, and may make any other payment necessary to protect its mortgage security, and Mortgagors shall, immediately upon demand of Mortgagee, repay to Mortgagee the amount so expended by it, and Mortgagor's failure so to do may be treated by Mortgagee as a violation of the terms of this mortgage, and Mortgagee may declare the entire note and mortgage due and payable the same as by expiration of time, and may proceed to foreclose this Mortgage as hereinafter provided; provided further, that if Mortgagee does not elect to declare this mortgage and said note due and payable, then all sums paid as taxes, assessments, for

discharging liens of laborers and materialmen, for fire insurance premiums, or for any other purpose necessary to protect its mortgage security, shall bear interest from the date of the payment thereof by Mortgagee at the rate of eight per cent per annum, shall be deemed secured by this mortgage, and shall be treated as a part of the principal for which this mortgage is given as security.

In the event of the failure of the Mortgagors to pay the principal due on said promissory note above-described and the interest thereon, or in the event of their failure to pay any installment of principal and interest as in said notes provided, or in the event of their failure to comply with any other provision of this mortgage, Mortgagee may declare this mortgage and the whole of the principal sum of said note and the interest thereon due and payable, and may immediately enter into possession of said mortgaged property, and the whole thereof, using all necessary force so to do, and may proceed to sell said mortgaged property as provided by law. And, to that end, Mortgagee is hereby authorized to delegate the power of seizure and sale of all of said personal property hereby mortgaged to the United States Marshal for the Fourth Judicial Division, Alaska, or to any of his deputies, and, in the event of the seizure of said property, he may proceed to sell said chattels at public auction in the manner provided by law for the sale of personal property under execution, and, from the proceeds thereof, shall pay, first, all expenses of seizure, keeping, and sale of said property, including a

reasonable fee for Mortgagee's attorney, and, second, shall apply the balance of the proceeds in reduction of said mortgage indebtedness, rendering the overplus, if any there be, to the Mortgagors herein.

And if said personal property does not sell for sufficient amount to pay all sums due under this mortgage and to pay the expenses of seizure, keeping, and sale of said personal property, including a reasonable fee for Mortgagee's attorney, Mortgagee may, at its option, proceed to foreclose this mortgage as to the real estate herein mortgaged; provided, however, the Mortgagee may, if it so elects, at any time after default as herein provided for, foreclose this mortgage as a whole, both as to said personal property and said real property and may sell the same as a whole, and any and all expenses, charges, and fees connected with such litigation, including the costs of enforcing any judgment and decree obtained herein and a reasonable fee for Mortgagee's attorney, shall be deemed to be secured hereby, and such judgment shall bear interest at the rate of eight per cent per annum from the date thereof until paid.

Until default on the part of the Mortgagors and a demand for possession by Mortgagee, Mortgagors may remain in the quiet, peaceable, and undisturbed possession of said mortgaged personal property, and the whole thereof, but said personal property shall not be removed, during the life hereof, from the Fairbanks Precinct, Alaska.

The terms and conditions hereof shall inure to

and bind each of the parties hereto and the successors and assigns of said Mortgagee and the heirs and assigns of said Mortgagors.

Time is of the essence hereof.

In Witness Whereof, said Mortgagors have hereunto set their hands and seals at Fairbanks, Alaska, on the day and year first above-written.

[Seal] /s/ A. L. Kaye

[Seal] /s/ Jean Kaye by A. L. Kaye,
 Attorney in Fact

Signed, sealed and delivered in the presence of:

 /s/ Mildred Seeliger

 /s/ Olga M. Holecek

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

This Is To Certify That on this 3rd day of December, 1948, before me, the undersigned, a Notary Public in and for the Territory of Alaska, personally came A. L. Kaye and Jean Kaye by her attorney, to me known to be the persons described in and who executed the within and foregoing real and chattel mortgage, and acknowledged to me that they signed and sealed said instrument as their free and voluntary act and deed for the uses and purposes therein mentioned.

Witness my hand and Notarial Seal on the day and year in this certificate first above written.

[Seal] /s/ Phillip A. Johnson,
 Notary Public for Alaska

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

A. L. Kaye and Jean Kaye by her attorney, and
P. A. Johnson, being first duly sworn, each for him-
self and not one for the other, on oath deposes and
says:

We are the Mortgagors named in the foregoing
Real and Chattel Mortgage;

I am the Vice President of the Bank of Fair-
banks, an Alaska corporation, the Mortgagee named
in said mortgage;

Each Affiant: That said Mortgage is made in
good faith to secure the amount named therein,
which is a bona fide existing debt owing from Mort-
gagor to Mortgagee and due as and when in said
Mortgage and note hereinabove described, and this
mortgage is not given or made with any purpose,
intention, or design of hindering, delaying, or de-
frauding any creditor or creditors of Mortgagors.

/s/ A. L. Kaye

/s/ Jean Kaye by A. L. Kaye,
Attorney in Fact

/s/ P. A. Johnson

Subscribed and sworn to before me on this 3rd
day of December, 1948.

[Seal] /s/ Phillip A. Johnson,
A Notary Public for Alaska

Recorded as a Real Mortgage on December 8th, 1948, in Volume . . of Real Mortgages as instrument No. 110,949.

Filed as a Chattel Mortgage on December 8th, 1948, in Volume 6 of Chattel Mortgages as instrument No. 110,950.

EXHIBIT "C"

Mortgage

This Indenture, made this 30th day of Jan., 1950, by and between A. L. Kaye and Jean Kaye, his wife, of Fairbanks, Alaska, Mortgagors, and the Bank of Fairbanks, an Alaska Corporation, Mortgagee,

Witnesseth:

That said Mortgagors, for and in consideration of the sum of Five Thousand and No/100ths (\$5,000.00) dollars lawful money of the United States of America, to them in hand paid by Mortgagee, the receipt whereof is hereby acknowledged do by these presents grant, bargain, sell, convey, and confirm unto said Mortgagee, its successors and assigns, forever, the following described real and personal property situated in Fairbanks precinct, Alaska, to-wit:

Those certain portions of Lots Two (2) and Three (3) in Block Ninety-six (96) according to the official plat of said Townsite of Fairbanks, more particularly described as follows: Commencing at a point on the north end line of said Lot Three on

Seventh Avenue in the Town of Fairbanks which said point is 55 ft. from the Northwest corner of said Lot Three; thence East along the North end line of said lot 65.1 ft. to the Northeast corner hereof; thence continuing East along the North end line of said Lot Two 10 ft.; thence South 79.25 ft. along a line parallel to the West side line of said Lot Two; thence West along a line parallel to the North end line of said Lot Two 10 ft. to the East side line of said Lot Three; thence South along said East line of Lot Three 79.25 ft. to the Southeast corner thereof on Eighth Ave.; thence West along the South end line of said Lot Three to a point which is 55 ft. from the Southwest corner of said lot; thence North along a line parallel to the West side line of said Lot Three to the point of beginning; together with all buildings and improvements situate thereon and the contents of said buildings including all furniture, fixtures, carpets, appliances and utensils in the house on the above described property. All of the above property is subject to a mortgage dated May 8, 1945 to the above mortgagee on which the unpaid balance this date is \$900.00, and a mortgage dated 22 November 1948 to the above mortgagee on which the unpaid balance this date is \$6,300.00, and a mortgage dated 24 June 1949 to the above mortgagee on which the unpaid balance this date is \$700.00, all three made by the above mortgagors.

Together with all improvements located thereon including stoves and furniture of every sort.

To Have And To Hold, all and singular, said

real and personal property unto said Mortgagee, its successors and assigns forever.

This Conveyance, however, is intended as a mortgage to secure the payment to Mortgagee by the Mortgagors of the sum of Five Thousand and no/100ths dollars, together with interest thereon at the rate of eight (8) per cent per annum from this date until paid, in lawful money of the United States of America, which said amount said Mortgagor hereby promise and agree to pay to said Mortgagee according to the terms and conditions of one certain promissory note dated 30 January, 1950, in the amount of \$5,000.00, bearing interest at the rate of eight per cent per annum of which the mortgagors are the makers according to the terms thereof.

And these presents shall be void if the principal and interest of said notes are paid as therein specified and if all the terms and conditions of this mortgage are fully complied with, otherwise to be and remain in full force, and effect.

Mortgagors hereby covenant and agree to and with said Mortgagee that they are the true and lawful owners of the real and personal property herein mortgaged, and that the same is free and clear of all liens and encumbrances, and that they will warrant and will forever defend the title thereto, subject, however, to the three mortgages described above.

[Printer's Note: The balance of Exhibit "C" is the same as Exhibit "B" set out at pages 27-30.]

EXHIBIT "D"

Mortgage

This Indenture, made this 3rd day of Feb. 1951, by and between A. L. Kaye and Jean Kaye, his wife, of Fairbanks, Alaska, Mortgagor, and the Bank of Fairbanks, an Alaska Corporation, Mortgagee,

Witnesseth:

That said Mortgagor, for and in consideration of the sum of Five Thousand and no/100ths (\$5,000.00) dollars lawful money of the United States of America, to them in hand paid by Mortgagee, the receipt whereof is hereby acknowledged do by these presents grant, bargain, sell, convey, and confirm unto said Mortgagee, its successors and assigns, forever, the following described real and personal property situated in Fairbanks precinct, Alaska, to wit:

Those certain portions of Lots Two (2) and Three (3) in Block ninety-six (96) according to the official plat of said Townsite of Fairbanks, more particularly described as follows: Commencing at a point on the North end line of said Lot Three on Seventh Avenue in the Town of Fairbanks which said point is 55 ft. from the Northwest corner of said Lot Three; thence East along the North end line of said lot 65.1 ft. to the Northeast corner hereof; thence continuing East along the North end line of said Lot Two 10 ft.; thence South 79.25 ft. along a line parallel to the West side line of said Lot Two; thence West along a line parallel to the

North end line of said Lot Two 10 ft. to the East side line of said Lot Three; thence South along said East line of Lot Three 79.25 ft. to the Southeast corner thereof on Eighth Ave.; thence West along the South end line of said Lot Three to a point which is 55 ft. from the Southwest corner of said lot; thence North along a line parallel to the West side line of said Lot Three to the point of beginning; together with all buildings and improvements situate thereon and the contents of said buildings including all furniture, fixtures, carpets, appliances and utensils in the house on the above described property. All of the above property is subject to a mortgage dated May 8, 1945 to the above mortgagee on which the unpaid balance this date is \$900.00, and mortgage dated 22 November 1948 to the above mortgagee on which the unpaid balance this date is \$4100.00, and a mortgage dated 30 January 1950 to the above mortgagee on which the unpaid balance is \$5000.00, all three made by the above mortgagors.

Together with all improvements located thereon including stoves and furniture of every sort.

To Have And To Hold, all and singular, said real and personal property unto said Mortgagee, its successors and assigns forever.

This Conveyance, however, is intended as a mortgage to secure the payment to Mortgagee by the Mortgagors of the sum of Five Thousand and no/100ths dollars, together with interest thereon at the rate of eight (8) per cent per annum from this date until paid, in lawful money of the United

States of America, which said amount said Mortgagor hereby promise and agree to pay to said Mortgagee according to the terms and conditions of one certain promissory note dated February 3, 1951, in the amount of \$5,000.00, bearing interest at the rate of eight per cent per annum of which the mortgagor are the makers according to the terms thereof.

And these presents shall be void if the principal and interest of said notes are paid as therein specified and if all the terms and conditions of this mortgage are fully complied with, otherwise to be and remain in full force, virtue, and effect.

Mortgagors hereby covenant and agree to and with said Mortgagee that they are the true and lawful owners of the real and personal property herein mortgaged, and that the same is free and clear of all liens and encumbrances, and that they will warrant and will forever defend the title thereto.

[Printer's Note: The balance of Exhibit "D" is the same as Exhibit "B" set out at pages 27-30.]

[Endorsed]: Filed April 23, 1952.

[Title of District Court and Cause.]

ANSWER AND AFFIRMATIVE DEFENSES

Comes Now the defendant, Josephine Boussard, and for answer to plaintiff's Complaint admits, denies, and avers, as follows:

I.

Admits paragraphs I, II, and III of plaintiff's Four Causes of Action as set out in its Complaint.

II.

For lack of knowledge and information denies paragraph IV of plaintiff's Four Causes of Action as set out in its Complaint.

III.

Denies paragraph V of plaintiff's Four Causes of Action as set out in its Complaint.

IV.

Admits paragraph VI and paragraph VII in plaintiff's Four Causes of Action as set out in its Complaint.

First Affirmative Defense

For her Affirmative Defense against the plaintiff, the defendant, Josephine Boussard, alleges and says:

I.

That on the 9th day of October, 1951, a Contract of Purchase and Sale was entered into between the defendants', A. L. Kaye and Jean Kaye, and the de-

endant, Josephine Boussard, concerning the real property which is the subject of this action, a true copy of said contract being attached hereto, made a part hereof by reference as though set out in full and marked Exhibit "1".

II.

That defendant, Josephine Boussard, purchased property described in Exhibit "1" from A. L. Kaye and Jean Kaye, subject to mortgages set out in plaintiff's Complaint, for the sum of \$31,500.00, of which sum \$4,000.00 is not set out in said Exhibit "1", and that the said sale was consummated with complete knowledge and consent of plaintiff's officers.

III.

That on the 9th day of October, 1951, the original of this defendant's Exhibit "1", together with the original of escrow instructions annexed to Exhibit "1", together with a Warranty Deed conveying the property described in said contract was given to the plaintiff and placed in escrow by said plaintiff with full and complete knowledge of the actions and agreements made between the parties to said transaction.

IV.

That pursuant to the terms of said contract, the defendant, Josephine Boussard, on the 10th day of November, 1951, paid to plaintiff the sum of \$200.00 plus interest at the rate of 8% per annum on the \$15,000.00 and this defendant has continued to make said payments on principal balance and interest,

on or before the 10th day of each and every month thereafter and is not in default and said plaintiff accepted such payments of principal and interest and applied the same upon the indebtedness mentioned in plaintiff's Complaint, and this defendant is ready, willing and able to complete her said contract according to the terms thereof.

V.

That this defendant fully relying upon the promises and representations made to her and to her agent, by plaintiff's officers, that plaintiff would accept payments to discharge the mortgages set out in plaintiff's Complaint, according to the terms and in the manner as set out in Exhibit "1", she proceeded in good faith to sign said contract and thereafter made payments to plaintiff as aforementioned. That by reason of plaintiff's promises, representations and receipt of payments and interest under said contract, and applying such payments to the said mortgage indebtedness, and in consideration of the mutual agreements, express and implied, of this defendant assuming, taking over and paying off the defendants Kaye's said mortgages, plaintiff has waived its right of foreclosure on said mortgages and has extended the time for payment thereof and is estopped, being lawfully bound to accept payment of said mortgage indebtedness according to the terms of said Exhibit "1", and this defendant will be subject to irreparable damage if the prayer to plaintiff's Complaint be granted.

VI.

That it has become necessary for the defendant, Josephine Boussard, to employ an attorney to defend her interests and she should recover a reasonable fee for her said attorney.

Second and Alternative Affirmative Defense

I.

Repleads paragraphs I, II, III, IV of this defendant's First Affirmative Defense, as though set out in full again.

II.

That at all times herein mentioned, this defendant has fulfilled all of the terms, covenants and conditions set forth in the contract Exhibit "1", and at all times mentioned has acted in good faith.

III.

That in the event this defendant is denied relief in her First Affirmative Defense, then her contract, Exhibit "1", and escrow agreement with the defendants' Kaye, should be adjudged a lien upon the real and personal property described in plaintiff's Complaint, and this defendant should have judgment against the other defendants and be subrogated to all of their rights and title in and to said property, including the right of redemption.

IV.

That it has become necessary for the defendant, Josephine Boussard, to employ an attorney to defend her interests and she should recover a reasonable fee for her said attorney.

Wherefore, the defendant, Josephine Boussard, having fully answered plaintiff's Complaint and set forth her Affirmative Defenses, prays the Court as follows:

1. That plaintiff take nothing by its action;
2. That in the alternative, her contract, Exhibit "1", be adjudged a lien upon the real and personal property described in plaintiff's Complaint, and that she recover judgment against defendants', A. L. Kaye and Jean Kaye, for all money expended on account of said contract, and that she be subrogated to all of the right, title and interest of the other said defendants, in and to said property, including the right of redemption.
3. For a reasonable fee for her attorney.
4. For such other and further relief as may be just and equitable in the premises.

/s/ R. J. McNEALY,

Attorney for defendant, Josephine
Boussard

Duly Verified.

Acknowledgment of Service Attached.

EXHIBIT "1"

Contract of Purchase and Sale

This Agreement, made and entered into in triplicate on this 9 day of October, 1951, by and between A. L. Kaye and Jean Kaye, husband and wife, hereinafter called "Sellers", and Josephine Baussard, hereinafter called "Buyer",

Witnesseth:

Whereas, Sellers own the real property hereinafter described and Buyer has agreed to purchase same on the terms and conditions hereinafter set forth, notwithstanding the fact that said property is subject to mortgages in favor of the Bank of Fairbanks securing four promissory notes, payable to said bank for an aggregate sum of Fifteen Thousand Dollars (\$15,000.00), with interest from October 1, 1951, at Eight Percent (8%) per annum, it being understood and agreed that payments made under this contract will be applied to the satisfaction of said notes and mortgages prior to delivery of deed hereunder.

Now, Therefore, for and in consideration of the sum of One Thousand Dollars (\$1,000.00), lawful money of the United States, in hand this day paid to Sellers by said Buyer, receipt whereof is hereby acknowledged as down payment on the purchase price hereinafter mentioned, and in reduction thereof, said Sellers hereby agree to grant, bargain, sell, and convey to said Buyer, and said Buyer hereby agrees to purchase the following described parcel of land in the Fairbanks Recording District, Fourth Division, Territory of Alaska, to-wit:

Those certain portions of Lots Two (2) and Three (3) in Block Ninety-six (96) according to the official plat of said Townsite of Fairbanks, more particularly described as follows: Commencing at a point on the North End line of Lot Three (3) on Seventh Avenue in the Townsite of Fairbanks, Alaska, which said

point is 55 feet from the Northwest Corner of said Lot Three (3); thence East along the North end line of said lot 65.1 feet to the Northeast corner thereof; thence continuing East along the North end line of Lot Two (2) 10 feet; thence South 79.25 feet more or less along the West line of the property conveyed to Lillian M. Webb by deed recorded in Book 36 Deeds, Page 632 to the North line of the property conveyed by Carroll H. Van Scoy et ux to Martin Gray et ux by deed recorded in Book 43 Deeds, Page 29; thence West and along the said North line to the East line of Lot 3, thence S. along E. line of Lot Three (3) 79.25 feet more or less to the Southeast corner thereof on Eighth Avenue; thence West along the South line of Lot Three (3) to a point 69 feet from the Southwest corner of Lot Three (3); thence North $39^{\circ} 31'$ East 77.36 feet; thence West and along a continuation of the line dividing the property of Berry and Krize 13 feet; thence North $39^{\circ} 30'$ East 76.94 feet to the point of commencement, together with dwelling thereon,

for the full purchase price of \$27,500.00, lawful money of the United States, with interest on the deferred balance of \$26,500.00 as follows, to-wit: interest upon \$15,000.00 to be paid by the application of the first installments hereunder to the aforesaid notes and mortgages at the rate of 8% per annum, the remainder of money due from Buyer to Sellers under this contract to carry interest at the rate of

6% per annum from date hereof, deferred payments and interest to be paid as follows:

The sum of Two Hundred Dollars (\$200.00) on or before the 10th day of November, 1951, plus interest on the \$15,000.00 due the bank, as aforesaid, and \$200.00 on or before the 10th day of each and every month thereafter, plus interest on the reduced principal pertaining to said notes and mortgages at the rate of 8% per annum, until said \$15,000.00, with interest, applicable to said notes and mortgages is fully liquidated, after which monthly payments of \$200.00 per month, applicable on the remainder of purchase price, as above specified, shall be paid, plus interest at the rate of 6% per annum, all of which payments are to be made for the account of Sellers at the Bank of Fairbanks, Fairbanks, Alaska, each of which payments on principal shall in reduction of principal, upon which reduced balance interest is to be computed for the following month.

Said Buyer reserves the right to pay larger amounts than above specified at any time, up to balance in full.

It is hereby mutually agreed between the parties hereto that, in the event of the failure of Buyer to pay each of said deferred installments of purchase price and interest, as and when the same become due, as hereinabove specified, or in the event of her failure to comply with each and all of the provisions of this agreement, said Sellers shall be released from all obligation, in law or equity, to convey said property to Buyer, and all Buyer's rights

under this agreement to the above described real and personal property shall, at the option of Sellers, be forfeited, and said Sellers may resume possession thereof and may retain as rental for the use of said property and as liquidated damages all sums of money theretofore paid by Buyer as part of the purchase price and interest above mentioned, provided that, in the event Buyer defaults hereunder, Sellers may make a payment, or payments, required upon said notes and mortgages to prevent default with respect thereto.

Said Buyer hereby covenants and agrees with said Sellers that she will assume and pay, before the same become delinquent, all taxes and assessments which may be hereafter levied by any lawful authority on the above described property.

Said Buyer agrees to keep said building insured against loss by fire at her own expense in a reliable insurance company in a sum not less than the amount due Sellers hereunder, said insurance to be made payable to the parties hereunder as their respective interests appear, the policies to be deposited with the escrow holder hereinafter mentioned.

Said Sellers agree that Buyer shall have exclusive possession of said property from date hereof, unless and until default occurs.

Said Buyer agrees to keep and maintain said property in good condition and repair at her own expense, and to keep said premises free and clear of all liens and encumbrances of every kind whatso-

ver until said purchase price and interest are fully paid. (Excepting aforesaid mortgages).

It is further agreed that, in order to carry out the terms of this agreement, Sellers shall make, execute, and place in escrow at the Bank of Fairbanks, Fairbanks, Alaska, a good and sufficient Warranty Deed to said above described property, conveying the same to Buyer, her heirs, and assigns, upon the fulfillment by her of all the terms, covenants, and agreements herein contained, but not otherwise.

Time is of the essence of this agreement, but waiver of any default shall not be deemed to be a waiver of any subsequent default.

In Witness Whereof, the parties hereto have hereunto set their hands and seals on the day and year in this instrument first above written.

Seal] A. L. Kaye

Seal] Jean Kaye

/s/ By A. L. Kaye,
Her Attorney in Fact,
Sellers

Seal] /s/ Josephine Baussard,
Buyer

In the Presence of:

/s/ Lazar Dworkin

/s/ John P. Cain

United States of America,
Territory of Alaska—ss.

This Is To Certify that on this 9 day of October, 1951, before me, the undersigned, a Notary Public for Alaska, personally came A. L. Kaye, for himself and in his capacity as attorney in fact for Jean Kaye, to me known to be the person described in and who executed the within and foregoing contract, and he acknowledged to me that he signed and sealed same as the free and voluntary act of himself and his said principal for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed my notarial seal on the day and year in this certificate first above written.

[Seal] /s/ Lazar Dworkin,
Notary Public for Alaska

Escrow

To: The Bank of Fairbanks October 9, 1951
Fairbanks, Alaska

The following is handed you herewith:

An executed copy of Contract of Purchase and Sale this day entered into between A. L. Kaye and Jean Kaye, as Sellers, and Josephine Baussard, as Buyer, pertaining to portions of Lots 2 and 3, Block 96, Fairbanks Townsite, for the total purchase price of \$27,500.00, the down payment being \$1,000.00, and balance to be paid in installments of \$200.00, plus interest, per month.

One Warranty Deed from the aforesaid Sellers to the aforesaid Buyer covering said property.

You are instructed as follows: retain said Warranty Deed, together with this escrow and said Contract, until such time as the installments provided for in said Contract have been paid in full, or said Contract has been otherwise terminated. If, as, and when said Buyer has paid the entire balance due, and presented proof of same, you should deliver said Warranty Deed to her. The installment payments will be made to Sellers at your bank.

You are instructed further that from the outset, payments of \$200.00, plus interest accrued at the rate of 8% per annum, as indicated by notes and mortgages held by the bank, are to be applied by the bank toward the payment of said notes and mortgages, after which such installment payments, plus interest on the remaining balance under this contract at the rate of 6% per annum, are to be deposited to the account of Sellers at your bank.

You are further instructed that if, in the event said Buyer has defaulted, and due proof is presented to you of same, and that Sellers have elected to forfeit and determine said installment Contract, and have so terminated same, you are to return said Warranty Deed to them upon their request.

At the time of delivery of said Deed to Buyer, you are authorized and instructed to attach to said Deed the required documentary stamps, the costs hereof to be charged to Sellers. Sellers will also

pay your escrow charges and charges for receiving said installment payments.

/s/ A. L. Kaye

Jean Kaye

/s/ By A. L. Kaye, Her Attorney in Fact
Sellers

/s/ Josephine Baussard
Buyer

[Endorsed]: Filed June 12, 1952.

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS, A. L. KAYE
AND JEAN KAYE

Come Now, the defendants, A. L. Kaye and Jean Kaye, and for answer to plaintiff's Complaint, admit, deny and allege as follows:

I.

Admit the Allegations contained in Paragraphs I, II, III, IV and VI in each of plaintiff's four Causes of Action.

II.

Deny the allegations contained in Paragraph V of each of said causes of action.

III.

Answering the allegations contained in Paragraph VII of each of said causes of action, deny

that the claim and interest of Josephine Boussard is subsequent to and subject to the lien of plaintiff's mortgages referred to in said causes of action.

For a further, separate and affirmative answer and defense to each of plaintiff's four causes of action, defendants allege.

I.

That on the 9th day of October, 1951, a contract of purchase and sale was entered into by and between A. L. Kaye and Jean Kaye, referred to as sellers, and Josephine Boussard, referred to as buyer, a copy of which is attached to and made a part by reference of the answer filed herein by the defendant, Josephine Boussard, and is hereby referred to and made a part of this answer, which said contract, together with the Escrow instructions were marked as Exhibit "I".

II.

That said contract of sale and said escrow instructions were entered into with the full knowledge and consent of plaintiff and the plaintiff agreed to act as escrow holder of the contract of sale, the deed transferring the property from these defendants to the defendant, Josephine Boussard, and it was also agreed by and between the plaintiff and defendants that the said notes and mortgages referred to in the four causes of action contained in plaintiff's Complaint would be extended and that

the said plaintiff would accept the monthly payments of \$200.00 per month, together with the interest due thereon, as payments upon said mortgages and that no further payments would be required to be made by the said defendant or any of them. That it was with this understanding and agreement between the plaintiff and the defendants that the defendants, A. L. Kaye and Jean Kaye, agreed to sell said property to the defendant, Josephine Boussard. That plaintiff accepted said payments and the said defendant, Josephine Boussard, has continued to make said payments each month to the said bank to apply upon said mortgages as agreed upon by all of the said parties to this action and the said bank has accepted the same and applied them upon said notes and mortgages in part payment thereof.

III.

That the said defendants, A. L. Kaye and Jean Kaye, relying upon the promises of the said plaintiff to extend said notes and mortgages and to accept said payments as in said contract provided agreed to sell said property to the said Josephine Boussard and the said plaintiff has waived its right of foreclosure of said mortgages and should be estopped from claiming that it has a right to foreclose said mortgages and sell said property as prayed for in said Complaint on file herein.

Wherefore, said defendants pray that said Complaint of plaintiff be dismissed and that said defendants recover their costs and disbursements

herein and a reasonable attorney's fee to be allowed by the Court.

/s/ JULIEN A. HURLEY,
Attorney for Defendants,
A. L. Kaye and Jean Kaye.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed June 25, 1952.

—

[Title of District Court and Cause.]

REPLY TO THE ANSWER AND AFFIRMATIVE DEFENSES OF DEFENDANT,
JOSEPHINE BOUSSARD

Now Comes the Plaintiff above-named, and for reply to the Answer and Affirmative Defenses of the Defendant, Josephine Boussard, admits, denies and alleges as follows:

I.

This Plaintiff admits the allegations contained in Paragraph I of the First Affirmative Defense contained in the answer of Defendant, Josephine Boussard.

II.

With reference to the allegations contained in Paragraph II of the Defendant Boussard's First Affirmative Defense, the Plaintiff does not have sufficient knowledge thereof upon which to base a belief and therefore denies the same.

III.

With reference to the allegations contained in Paragraph III of the Defendant Boussard's First Affirmative Defense, the Plaintiff admits that the contract was placed in escrow with the Plaintiff, but denies the remaining allegations of said Paragraph III.

IV.

The Plaintiff denies the allegations contained in Paragraphs IV, V, and VI of the First Affirmative Defense of the Defendant Boussard.

V.

With reference to the Second and Alternative Affirmative Defense contained in the answer of the Defendant Boussard, the Plaintiff does not have sufficient knowledge thereof regarding Paragraphs I, II, III and IV of the Second and Alternative Affirmative Defense upon which to base a belief and, therefore, denies the same.

Wherefore, the Plaintiff prays as by its Complaint filed herein.

BANK OF FAIRBANKS,

/s/ By R. C. BAILEY,

Vice-President.

/s/ MAURICE T. JOHNSON,

Attorney for Plaintiff.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed October 13, 1953.

[Title of District Court and Cause.]

REPLY TO ANSWER OF THE DEFENDANTS,
A. L. KAYE AND JEAN KAYE

Now Comes the Plaintiff, above-named, and for reply to the answer of the Defendants, A. L. Kaye and Jean Kaye, admits, denies and alleges as follows:

I.

With reference to the allegations contained in Paragraph I of the separate and affirmative defense, the Plaintiff does not have sufficient knowledge thereof upon which to base a belief and, therefore, denies the same, for the reason that no copy of the alleged contract was attached to the copy of the answer served upon this Plaintiff.

II.

With reference to the allegations contained in Paragraph II of the affirmative defense, the Plaintiff admits that the contract of sale was placed in escrow with the Plaintiff together with the deed transferring the property from the Defendants, A. L. Kaye and Jean Kaye, to the Defendant, Josephine Boussard, but this Plaintiff denies each and all of the remaining allegations contained in said Paragraph II.

III.

The Plaintiff denies the allegations contained in Paragraph III of the affirmative defense.

Wherefore, the Plaintiff prays as by its Complaint herein.

BANK OF FAIRBANKS

/s/ By R. C. BAILEY,
Vice-President, Plaintiff.

/s/ MAURICE T. JOHNSON,
Attorney for Plaintiff.

Duly Verified.

Acknowledgment of Service attached.

[Endorsed]: Filed October 13, 1953.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause having come on regularly for hearing on the 16th day of August, 1954, before the Honorable Harry E. Pratt, District Judge; and the Plaintiff having appeared by and through its attorney Maurice T. Johnson; and the Defendants A. L. Kaye and Josephine Boussard having appeared personally and by and through their attorney George B. McNabb, Jr.; and the Plaintiff and the Defendants having introduced oral and written testimony and evidence in behalf of each of them; and the Court having heard the same and being duly apprised in the premises does hereby make and enter the following its,

Findings of Fact

I.

That the Plaintiff is an Alaskan Banking Corporation duly authorized and existing under and by virtue of the laws of the Territory of Alaska.

II.

That the Plaintiff has filed its annual report last due and has paid its corporate tax last past due to the Territory of Alaska.

III.

On the 8th day of November, 1951, the Defendants A. L. Kaye and Jean Kaye were indebted to the Plaintiff on a promissory note dated May 8, 1945, in the principal sum of Ten Thousand (\$10,000.00) Dollars, a copy of which note was introduced into evidence as the Plaintiff's Exhibit C, upon which said note there was a principal balance due as of the 8th day of November, 1951, in the sum of Nine Hundred (\$900.00) Dollars.

IV.

On the 8th day of November, 1951, the Defendants A. L. Kaye and Jean Kaye were further indebted to the Plaintiff on a certain promissory note dated November 22, 1948, said note being in the principal sum of Six Thousand Three Hundred (\$6,300.00) Dollars, a copy of which said note was introduced into evidence as the Plaintiff's Exhibit E, and upon said 8th day of November, 1951, the Defendants A. L. Kaye and Jean Kaye were

indebted to the Plaintiff on said note in the principal sum of Four Thousand One Hundred (\$4,100.00) Dollars.

V.

That on the 8th day of November, 1951, the Defendants A. L. Kaye and Jean Kaye were indebted to the Plaintiff on a certain promissory note dated January 30, 1950, said note being in the principal sum of Five Thousand (\$5,000.00) Dollars, a copy of which said note was introduced into evidence as Plaintiff's Exhibit G; and on said 8th day of November, 1951, the Defendants A. L. Kaye and Jean Kaye were indebted to the Plaintiff on said note in the principal sum of Five Thousand (\$5,000.00) Dollars.

VI.

On the 8th day of November, 1951, the Defendants A. L. Kaye and Jean Kaye were indebted to the Plaintiff on a certain promissory note dated February 3, 1951, said note being in the principal sum of Five Thousand (\$5,000.00) Dollars, a copy of which said note was introduced into evidence as Plaintiff's Exhibit I. On said 8th day of November, 1951, the Defendants were indebted on said note in the principal sum of Five Thousand (\$5,000.00) Dollars.

VII.

That on the 8th day of November, 1951, the Defendants A. L. Kaye and Jean Kaye were indebted to the Plaintiff on the four (4) promissory notes hereinabove mentioned in the principal sum of Fifteen Thousand (\$15,000.00) Dollars, together

with accrued interest thereon. Said interest computed or to be computed at the rate of eight (8%) per cent per annum.

VIII.

Each, every and all of the hereinabove mentioned promissory notes was secured by a real and chattel mortgage duly executed by the Defendants A. L. Kaye and Jean Kaye, which said mortgage constituted a lien and encumbrance against the following described real property situate in the City of Fairbanks, Fairbanks Precinct, Territory of Alaska more particularly described as follows, to-wit:

Those certain portions of Lot Two (2) and Three (3) of Block Ninety Six (96) according to the official plat of said townsite of Fairbanks more particularly described as follows:

Commencing at a point on the North end line of said Lot 3 on the 7th Avenue in the Town of Fairbanks, which said point is 55' from the North West corner of said Lot 3; thence East along the North end line of said Lot 65.1' to the North East corner thereof; thence continuing East along the North end line of said Lot 2, 10'; thence South 79.25' along a line parallel to the West side line of said Lot 2; thence West along a line parallel to the North end line of said Lot 2, 10' to the East side line of said Lot 3; thence South along said East side line of Lot 3, 79.25' to the South East corner thereof on 8th Avenue; thence West along the South end line of said Lot 3 to a point which is 55' from the South West corner of said Lot; thence North along a line parallel to the West side line of

said Lot 3 to the point of beginning, together with all buildings.

IX.

That on the 8th day of November, 1951, the Defendants A. L. Kaye and Jean Kaye were in default in the payment of each, every and all of the four (4) promissory notes referred to hereinabove and had so been in default in the payment of said notes for a period in excess of six (6) months prior to the 8th day of November, 1951.

X.

On the 19th day of October, 1951, a contract of purchase and sale was executed by and between A. L. Kaye and Jean Kaye therein referred to as Sellers and Josephine Boussard therein referred to as Buyer, a copy of which said contract was introduced into evidence as Exhibit . . ., the subject of which said contract of sale was the real and personal property mortgaged by the Defendants A. L. Kaye and Jean Kaye to the Plaintiff Bank of Fairbanks, all as more particularly described hereinabove and which said mortgage secured the promissory notes referred to hereinabove.

XI.

On said day and date the Vice-President of Plaintiff Bank at Fairbanks recognized Josephine Boussard as an excellent credit risk and did consider the credit of A. L. Kaye and Jean Kaye to be of a questionable character.

XII.

Said contract of sale provided for the payment by the Buyer, the Defendant Josephine Boussard, of Twenty Six Thousand Five Hundred (\$26,500.00) Dollars, which said amount was to be paid in deferred monthly payments at the rate of Two Hundred (\$200.00) Dollars per month, Fifteen Thousand (\$15,000.00) Dollars of which said amount was to bear interest at the rate of eight (8%) per cent per annum on the deferred balance with the remaining Eleven Thousand and Five Hundred (\$11,500.00) Dollars to bear interest at the rate of six (6%) per cent per annum on the deferred balance. All interest payments as provided by said contract were to be made in addition to the equal monthly payments of principal in the amount of Two Hundred (\$200.00) Dollars.

XIII.

The escrow instructions attached to said contract of purchase and sale provided that the payment of principal and interest at the rate of eight (8%) per cent per annum on the gross amount of Fifteen Thousand (\$15,000.00) Dollars should be, by the escrow holder, applied toward the liquidation of the indebtedness of Defendants A. L. Kaye and Jean Kaye to the Plaintiff Bank of Fairbanks. Said contract further provided that upon the liquidation of the Fifteen Thousand (\$15,000.00) Dollar indebtedness of the Defendants A. L. Kaye and Jean Kaye to the Plaintiff Bank of Fairbanks that the Defendant Josephine Boussard should continue to pay Two Hundred (\$200.00) Dollars per month

to the credit of Defendants Kaye until such time as the Defendants A. L. Kaye and Jean Kaye had received the sum of Eleven Thousand Five Hundred (\$11,500.00) Dollars, plus interest on said amount at the rate of six (6%) per cent per annum, said sum of Eleven Thousand Five Hundred (\$11,500.00) Dollars was, according to the terms and tenure of said contract, to bear interest at the rate of six (6%) per cent per annum commencing on the 19th day of October, 1951, said interest to be deposited to the account of the Defendants A. L. Kaye and Jean Kaye at the Bank of Fairbanks, Fairbanks, Alaska.

XIV.

Prior to the 19th day of October, 1951, the day and date upon which the Defendants and each of them executed the contract of purchase and sale to which reference is hereinabove made an agent of the Defendants Kaye discussed the terms and execution of said contract of sale with the Vice-President of the Bank of Fairbanks and did make unto said Vice-President of the Bank of Fairbanks a full, fair and complete disclosure of all of the terms, conditions, covenants and provisions to be in said contract contained, to which said terms, conditions, covenants and provisions said Vice-President did consent.

XV.

On the 19th day of October, 1951, a copy of the contract of purchase and sale between the Defendants was placed in escrow in the Bank of Fair-

banks, the Plaintiff to this action, as Escrow No. 691, the Vice-President of said Bank having on said day and date examined said contract and assented thereto and said Vice-President did accept said contract, together with the escrow instructions thereto attached and the deed to the property hereinabove more particularly described, into escrow for collection.

XVI.

On the 9th day of November, 1951; the 10th day of December, 1951; the 11th day of February, 1952; the 10th day of March, 1952; and the 8th day of April, 1952, the Defendant Josephine Boussard did make payments to the Plaintiff Bank of Fairbanks in strict compliance with the provisions of the contract of purchase and sale referred to hereinabove, the same being the subject of escrow No. 691, said payments and the entirety thereof were applied directly by the Plaintiff Bank of Fairbanks toward the satisfaction of the four (4) promissory notes of Defendants A. L. Kaye and Jean Kaye, to which notes reference is made hereinabove.

XVII.

That from and after the 9th day of November, 1951, to and including the 10th day of August, 1954, the Defendant Josephine Boussard did make payments to the Plaintiff Bank of Fairbanks in strict compliance with the provisions of the contract of purchase and sale referred to hereinabove. Said contract of purchase and sale being the sub-

ject of escrow No. 691 in the Plaintiff Bank of Fairbanks.

XVIII.

The Plaintiff Bank of Fairbanks did hold in suspense the payments made by the Defendant Josephine Boussard on the 10th day of May; the 5th day of June; and the 11th day of July, 1952; until the 21st day of July, 1952, upon which said day and date a total of Eight Hundred Eighty Eight Dollars (\$888.09) and nine cents was applied against the principal of the indebtedness of Defendants A. L. Kaye and Jean Kaye to the Plaintiff Bank of Fairbanks; and the sum of Sixty Nine Dollars (\$69.73) and seventy three cents toward the payment of interest on said indebtedness. The failure of the Plaintiff Bank to apply the payments to the indebtedness of the Defendants A. L. Kaye and Jean Kaye was wrongful in that it allowed interest to accrue on said indebtedness during a period in which the Plaintiff Bank was in possession of funds which should have been applied to the liquidation of said indebtedness.

XIX.

That from and after the 9th day of August, 1952, to and including the 10th day of December, 1953, the Plaintiff Bank did, in contravention and disregard of the escrow instructions attached to the contract of purchase and sale hereinabove mentioned, the same being the subject of escrow No. 691, did deposit to the special account of A. L. Kaye and Jean Kaye seventeen (17) consecutive pay-

ments made by Defendant Josephine Boussard under the provisions of escrow No. 691; and said Plaintiff Bank of Fairbanks did further, in contravention and disregard of the aforementioned escrow instructions, fail to apply to the indebtedness of A. L. Kaye and Jean Kaye, by reason thereof, a total of Four Thousand One Hundred Forty Four Dollars (\$4,144.71) seventy one cents; and did thereby further allow interest to accrue on the principal indebtedness of Defendants A. L. Kaye and Jean Kaye to the Plaintiff Bank on the four (4) promissory notes hereinabove mentioned, though funds were in the hands of the Plaintiff Bank for a partial liquidation of said indebtedness.

XX.

That from and after the month of January, 1954, and during each and every month thereafter to and including the month of August, 1954, the Plaintiff Bank accepted payments from the Defendant Josephine Boussard under the provisions of escrow No. 691 and did apply the proceeds of such payments directly toward the indebtedness of Defendants A. L. Kaye and Jean Kaye as evidenced by the promissory notes to which reference is made hereinabove.

And from the foregoing Findings of Fact, the Court does hereby make, enter and order the following, its

Conclusions of Law

I.

The Plaintiff Bank of Fairbanks did waive its

privilege to declare the promissory notes of the Defendants A. L. Kaye and Jean Kaye to be in default by its ratification of the provisions of the contract of purchase and sale, the subject of escrow No. 691, which said ratification and the acceptance of the payments by said Plaintiff Bank and the application of the proceeds thereof from and after the 9th day of November, 1951, did constitute a novation precluding the foreclosure of the mortgages held by the Bank securing the promissory notes of Defendants A. L. Kaye and Jean Kaye.

II.

That the Defendant Josephine Boussard is entitled to credit against the Fifteen Thousand (\$15,000.00) Dollar indebtedness of A. L. Kaye and Jean Kaye to the Bank of Fairbanks in the amount of each payment of principal and interest made by said Defendant and of and from the date of receipt of each and every payment by the Plaintiff Bank.

III.

That the Plaintiff shall take nothing by or from its complaint.

Done in open Court this 23rd day of August, 1954.

/s/ HARRY E. PRATT,
District Judge.

Acknowledgment of Service attached.

Lodged August 20, 1954.

[Endorsed]: Filed August 23, 1954.

In the District Court for the District of Alaska,
Fourth Division

No. 7114

BANK OF FAIRBANKS, an Alaskan Banking
Corporation, Plaintiff,

vs.

A. L. KAYE, JEAN KAYE and JOSEPHINE
BOUSSARD, Defendants.

JUDGMENT

The above-entitled cause came on regularly for trial before the Honorable Harry E. Pratt, Judge of the District Court, District of Alaska, Fourth Division, in the Court Room of the above-entitled Court at Fairbanks, Alaska, on the 16th day of August, 1954; the Plaintiff appearing by and through its attorney, Maurice T. Johnson and the Defendants A. L. Kaye and Josephine Boussard appearing in person and by and through their attorney George B. McNabb, Jr.; and the Court having heard the testimony and having examined the evidence offered by the respective parties; and the Court being fully advised in the premises and having filed herein its Findings of Fact and Conclusions of Law; and having directed that judgment be entered in accordance therewith,

Now Therefore, by reason of the law and the Findings aforesaid it is hereby Ordered, Adjudged and Decreed:

I.

That the Plaintiff shall take nothing by and from its complaint.

II.

That the Defendant Josephine Boussard is entitled to credit against the Fifteen Thousand (\$15,000.00) Dollar indebtedness of A. L. Kaye and Jean Kaye to the Plaintiff Bank of Fairbanks in the amount of each payment of principal and interest made by said Defendant and of and from the date of the receipt of each and every payment by the Plaintiff Bank.

III.

That the Defendants have and recover from the Plaintiff their costs to be assessed by the Clerk of this Court, together with a reasonable sum as and for the Defendants' attorney fee in the amount of \$1,250.00.

Let Execution Issue ten (10) days from the date hereof.

Dated this 24th day of August, 1954.

/s/ HARRY E. PRATT,
Judge.

Acknowledgment of Service attached.

[Endorsed]: Filed August 24, 1954.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The plaintiff moves the Court to set aside the findings of fact and conclusions of law and judgment entered herein on the 24th day of August, 1954, and grant the plaintiff a new trial on the grounds that:

1. The findings of fact and conclusions of law and judgment are contrary to the evidence.

2. That the findings of fact and conclusions of law and judgment are contrary to law in that they fail wholly to recognize the well established rule that the alleged novation was completely without consideration and that therefore no estoppel or novation could work against the right of the plaintiff to foreclose its mortgage, which right existed at the time the said novation is presumed to have occurred.

Dated at Fairbanks, Alaska, this 1st day of September, 1954.

MAURICE T. JOHNSON
WILLIAM V. BOGGESS
/s/ MAURICE T. JOHNSON,
Attorneys for Plaintiff.

Acknowledgment of Service attached.

[Endorsed]: Filed September 2, 1954.

[Title of District Court and Cause.]

ORDER

The Plaintiff was represented by Maurice T. Johnson; the defendant by George B. McNabb.

The Court made certain statements to counsel regarding the Plaintiff's Motion for a New Trial.

Mr. Johnson waived argument on the Plaintiff's aforementioned motion.

Mr. McNabb presented a short argument resisting the Motion.

It was Ordered that the Motion be denied and counsel was directed to draw and submit an Order to the Court.

Entered December 7, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Bank of Fairbanks, an Alaskan banking corporation, plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, from the judgment entered in this action on the 24th day of August, 1954, and from the order entered on December 7, 1954, denying the plaintiff's motion for a new trial.

Dated at Fairbanks, Alaska, this 15th day of December, 1954.

MAURICE T. JOHNSON and
WILLIAM V. BOGGESS

/s/ By MAURICE T. JOHNSON,
Attorneys for Bank of Fairbanks, an Alaskan
Banking corporation, Plaintiff Appellant.

Acknowledgment of Service attached.

[Endorsed]: Filed December 15, 1954.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

That we, Bank of Fairbanks, an Alaskan Corporation, as principal, and E. J. Rusing and John Contento, Jr., as sureties, are held and firmly bound unto A. L. Kaye, Jean Kaye and Josephine Boussard in the full sum of \$5,000.00, to be paid to the said A. L. Kaye, Jean Kaye and Josephine Boussard, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 15th day of December, 1954.

Whereas, lately in the District Court for the District of Alaska, Fourth Division, in a suit pending in said Court, between Bank of Fairbanks, an Alaskan banking corporation, plaintiff, vs. A. L. Kaye, Jean Kaye and Josephine Boussard, defend-

ants, No. 7114, a judgment was rendered against the said Bank of Fairbanks, an Alaskan banking corporation, and the said Bank of Fairbanks, plaintiff, having filed in said Court a notice of appeal to reverse the judgment in the aforesaid suit on appeal to the United States Court of Appeals for the Ninth Circuit, at a session of said Court of Appeals to be held at San Francisco, in the State of California.

Now, the condition of the above obligation is such that if the said Bank of Fairbanks, plaintiff appellant, shall prosecute its appeal to effect, and satisfy the judgment in full, together with costs, interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, if it failed to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

BANK OF FAIRBANKS,

/s/ By LESLIE NEILAND, President

[Seal] /s/ H. E. BOOTH, Secretary

[Seal] /s/ E. RUSING,

[Seal] /s/ JOHN CONTENTO, JR.,

Sureties

Acknowledged before me the day and year first above written.

[Seal] /s/ ALICE M. BAKER,

Notary Public in and for Alaska

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

E. J. Rusing and John Contento, Jr., being duly sworn, each for himself, deposes and says: That he is a freeholder in said District and is worth the sum of \$5,000.00, exclusive of property exempt from execution and over and above all debts and liabilities.

/s/ E. J. RUSING,

/s/ JOHN CONTENTO, JR.

Subscribed and sworn to before me this 15th day of December, 1954.

[Seal] /s/ ALICE M. BAKER,

Notary Public in and for Alaska

Form of bond and sufficiency of sureties approved.

/s/ VERNON D. FORBES,

District Judge

[Endorsed]: Filed December 15, 1954.

[Title of District Court and Cause.]

ORDER DENYING MOTION FOR NEW TRIAL

On this day, pursuant to due notice, there came on to be heard Plaintiff's Motion for New Trial heretofore filed in the above entitled action. Plaintiff appeared by and through Maurice T. Johnson,

its attorney of record, and Defendants appeared by and through George B. McNabb, Jr., their attorney of record.

The Court, having heard the arguments of counsel and being fully advised in the premises, is of the opinion that said motion should be denied.

It is, therefore, accordingly ordered that Plaintiff's Motion for New Trial be, and the same is hereby denied.

Done at Fairbanks, Alaska, this 16th day of December, 1954.

/s/ VERNON D. FORBES,
District Judge

Acknowledgment of Service attached.

[Endorsed]: Filed December 16, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR DOCKET
ING APPEAL

For good cause shown;

It Is Hereby Ordered that the Plaintiff-Appellant have to and including the 23rd day of February, 1955, within which to file and docket its appeal in the Circuit Court of Appeals, Ninth Circuit, at San Francisco pursuant to Rule 73 (g), Federal Rules of Civil Procedure.

Done at Fairbanks, Alaska, this 5th day of January, 1955.

/s/ VERNON D. FORBES,
District Judge

[Endorsed]: Filed January 5, 1955.

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Pursuant to Rule 75 (a) (d) of the Federal Rules of Civil Procedure, the Plaintiff-Appellant hereby designates the complete record and all the proceedings had in the above entitled cause, including the stenographic transcript of the testimony and evidence in the action, together with the notice of appeal, supersedeas bond, the order granting an extension of time for filing and docketing appeal, and this designation of record.

MAURICE T. JOHNSON and
WILLIAM V. BOGGESS,

/s/ By MAURICE T. JOHNSON,
Attorneys for Bank of Fairbanks, an Alaskan
Banking Corporation, Plaintiff-Appellant

Acknowledgment of Service attached.

[Endorsed]: Filed January 5, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the above-entitled Court, do hereby certify that the following list comprises all proceedings in this cause listed on the Designation of Record filed by the Plaintiff and the Appellant, viz.:

1. Complaint.
2. Summons.
3. Motion for Order directing Service of Summons by Publication.
4. Affidavit in Support of above Motion.
5. Order of Publication.
6. Motion for more definite Statement by deft. Boussard.
7. Answer and Affirmative Defenses of defdt. Boussard.
8. Answer of Defendants A. L. Kaye and Jean Kaye.
9. Motion for Judgment on the Pleadings by Plaintiff; Motion to strike Portions of the Answer of Defendant Josephine Boussard; Motion to make more definite and certain the Answer of the Defendant, Josephine Boussard.
10. Motion for Judgment on the Pleadings on the Answer of Defendants A. L. Kaye and Jean Kaye; Motion to strike Portions of the Answer of Defendants A. L. Kaye and Jean Kaye; Motion to make the Answer of A. L. Kaye and Jean Kaye more definite and certain.

11. Notice of Hearing by the Plaintiff.
12. Notice of Hearing by the Plaintiff.
13. Motion of Appearance of counsel and Withdrawal.
14. Minute Order in re substitution of counsel.
15. Hearing on Motions under No. 9 and 10, above.
16. Minute Order in re counsel for defdtd. Kaye.
17. Reply to the Answer and Affirmative Defenses of Defendant Josephine Boussard.
18. Reply to the Answer of the Defendants A. L. Kaye and Jean Kaye.
19. Motion to strike by Defendants Kaye the Reply.
20. Order resetting trial.
21. Trial by Court.
22. Findings of Fact and Conclusions of Law.
23. Judgment.
24. Cost Bill.
25. Judgment Roll.
26. Motion for New Trial.
27. Execution and Marshal's Return.
28. Lien of Attorneys representing Defendant Boussard.
29. Notice of Hearing on Motion for New Trial.
30. Minute Order denying Motion for New Trial.
31. Notice of Appeal.
32. Supersedeas Bond.
33. Signed Order Denying Motion for New Trial.
34. Signed Order extending Time to docket cause.
35. Designation of Contents of Record on Appeal.

Nealy, of Fairbanks, Alaska, attorney for Defendant Josephine Boussard. [1*]

Be It Remembered, that at 10:00 a.m., upon the 16th day of August, 1954, the trial of this cause, No. 7114, was begun, plaintiff and defendants represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

The Court: This is the time set for the trial in the case of Bank of Fairbanks vs. Kaye, et al, 7114.

Mr. Johnson: Plaintiff is ready, your Honor.

Mr. McNabb: Defendants are ready, your Honor.

The Court: Very well.

Mr. McNabb: May it please the court; Your Honor, we have on file here a motion to strike the pleading of the Bank of Fairbanks which is entitled a reply to the answer of defendants, A. L. Kaye and Jean Kaye. I would request that we dispose of that motion before we proceed with this matter, your Honor.

The Court: What was the motion?

Mr. McNabb: We filed, Judge, a motion to strike the reply or the pleading of the Bank of Fairbanks which is entitled a reply to the answer of defendants A. L. Kaye and Jean Kaye.

The Court: I will deny the motion.

Mr. McNabb: Well, your Honor, I would like to be heard on that matter if I may, please.

The Court: Well, I am just wondering. This is,

* Page numbers appearing at top of page of original Reporter's Transcript of Record

doesn't seem to be a motion. It is a reply and it is your motion against the reply.

Mr. McNabb: Yes, Judge, that is correct, sir. We filed a [3] motion to strike that reply.

The Court: Well, I will hear you.

Mr. McNabb: I would like to call the court's attention to Rule 7(a) of the Federal Rules of Civil Procedure and more particularly to Section 243 of Barron and Holtzoff which is written concerning that very rule and sub-paragraph of the rule, and on Page 401 of Volume I of Barron and Holtzoff it says affirmative defenses included in the answer do not necessitate a reply nor is a reply permitted to such answer, and there are a number of cases cited, Judge, and it continues to say unless the court orders a reply, and there again cites a number of cases, it would appear from a reading of Barron and Holtzoff nor the sections that I have quoted to the court, and there are a number of cases set out here, Judge, that a reply is not permitted unless the court does in fact order such a reply. For that reason, we feel that this reply should be stricken. The replies are allowed for the purpose of setting up defenses to cross-claims and counter-claims and matters brought out by third party plaintiffs, and in this instance there is no cross-complaint or no counter-claim, and we feel that that answer is not properly before the court, or reply, rather.

The Court: Well, it seems to me that in this case, in order to clarify the issues it is necessary to have that reply on file. It is for your benefit,

entirely for your benefit I would say, so I will consider this reply as ordered by the [4] court and deny your motion.

Mr. McNabb: Very well.

Mr. Johnson: Mr. Bailey.

RALPH C. BAILEY

a witness called in behalf of the plaintiff, was duly sworn and testified as follows:

Direct Examination

Q. (By Mr. Johnson): State your name, please.

A. Ralph C. Bailey.

Q. Where do you live, Mr. Bailey?

A. 1325 - 6th Street, Fairbanks.

Q. What is your business or occupation?

A. Banking.

Q. With whom are you connected?

A. Bank of Fairbanks.

Q. Is that the plaintiff in this case?

A. It is.

Q. In what capacity are you connected with the plaintiff?

A. Vice-President.

Q. And have you occupied that position for some time?

A. I have.

Q. Are you acquainted with A. L. Kaye?

A. I am.

Q. Jean Kaye? A. I am. [5]

Q. And are you acquainted with Josephine Boussard?

A. Yes.

Q. The defendants in this case? A. Yes.

Q. Are you also, or do you know whether or

(Testimony of Ralph C. Bailey.)

not the Bank of Fairbanks has filed its last annual report with the Territorial Auditor?

A. They have.

Mr. McNabb: I object to that as being—(Interrupted).

Mr. Bailey: They have.

Mr. McNabb: That it calls for—just a moment, now, Ralph. It is not the best evidence. I object to it on that ground.

Mr. Johnson: It has been admitted by all the defendants, if the court please.

Mr. McNabb: I objected on the ground it calls for a conclusion and it is not the best evidence, your Honor.

Mr. Johnson: If the court please, it has been admitted by both defendants, all of the defendants, both the Kaye's and Josephine Boussard have admitted the allegations of Paragraph I.

The Court: Well, it is necessary for the Bank to plead and prove that point where it is the plaintiff, not where it is the defendant. The Bank is the plaintiff here so the rule that I have just stated would be in force so I will sustain the objection.

Q. (By Mr. Johnson): Do you have in your possession a letter from the Territorial Auditor?

A. I do.

Clerk of Court: Plaintiff's Identification No. 1.

(Letter dated March 1, 1954 from Auditor of Alaska, Juneau, addressed to Bank of Fairbanks was marked Plaintiff's Identification No. 1.)

(Testimony of Ralph C. Bailey.)

Q. (By Mr. Johnson): I will show you Plaintiff's Identification 1, will ask you to tell what that is, if you know?

A. It is a receipt which acknowledges the annual report filed with the Territory.

Mr. McNabb: Just a moment, now, Ralph. I am going to object to that testimony, your Honor, on the ground that the instrument itself is the best evidence.

The Court: Objection sustained.

Mr. McNabb: Move that answer be stricken, your Honor.

The Court: It may be stricken.

Q. (By Mr. Johnson): Will you tell what that purports to be?

Mr. McNabb: Same objection.

The Court: Same ruling.

Q. (By Mr. Johnson): Where did you get that?

Mr. McNabb: Same objection, your Honor.

The Court: Objection overruled.

A. I got it from Neil Moore, Auditor of the Territory of Alaska.

Mr. McNabb: Now I object to that as not the best evidence. Hearsay, no proper foundation having been laid for it, calls for a conclusion, move that the answer be stricken.

The Court: Are you offering the exhibit?

Mr. Johnson: Well, I am trying to identify it is all, if the court please.

The Court: Well, I think the certificate is admissible in itself, judicial notice.

(Testimony of Ralph C. Bailey.)

Mr. Johnson: Very well. I now offer in evidence Plaintiff's Identification 1, which is a statement of the Auditor of the Territory of Alaska.

Mr. McNabb: Just a moment, I am going to object to it, your Honor, on the grounds it has not been properly identified.

The Court: In what respect?

Mr. McNabb: Well, there is a signature here which purports to be that of Neil F. Moore as the Auditor of Alaska. That signature has not been verified. The instrument isn't identified by anyone, no proper foundation laid for its admission.

The Court: Objection overruled. It may be admitted. [8]

Clerk of Court: Plaintiff's Exhibit "A".

(Plaintiff's Identification No. 1 was received in evidence as Plaintiff's Exhibit "A".)

Q. (By Mr. Johnson): During the past few years have you had business dealings on, or has the Bank of Fairbanks had business dealings with A. L. Kaye and Jean Kaye? A. They have.

Q. And have these business dealings consisted of loans secured by mortgages?

A. They have.

Q. Do you recall when the first such mortgage was executed?

Mr. McNabb: I am going to object to that as calling for a conclusion, not the best evidence.

The Court: Objection sustained.

Clerk of Court: Plaintiff's Identification No. 2.

(Testimony of Ralph C. Bailey.)

(Mortgage dated May 8, 1945, was marked Plaintiff's Identification No. 2.)

Clerk of Court: Plaintiff's Identification No. 3.

(Mortgage dated November 22, 1948 was marked Plaintiff's Identification No. 3.)

Clerk of Court: Plaintiff's Identification No. 4.

(Mortgage dated January 30, 1950 was marked Plaintiff's Identification No. 4.) [9]

Clerk of Court: And Plaintiff's Identification No. 5.

(Mortgage dated February 3, 1951 was marked Plaintiff's Identification No. 5.)

Q. (By Mr. Johnson): I will show you Plaintiff's Identification 2, will ask you what that is, if you know? A. It is a mortgage.

Q. Signed by whom?

A. A. L. Kaye and Jean Kaye.

Q. And is that an executed copy of the mortgage? A. It is.

Q. Is it in the same condition now as it was at the time it was signed, approximately?

A. It is.

Q. And was that given to secure a loan?

A. It was.

Q. Do you have the note which is secured by that mortgage? A. I have.

Q. Will you produce it, please.

Clerk of Court: Plaintiff's Identification No. 6.

(Mortgage Note dated May 8, 1945 was marked Plaintiff's Identification No. 6.)

Q. (By Mr. Johnson): Show you Plaintiff's

(Testimony of Ralph C. Bailey.)

Identification No. 6, will ask you what that is? [10]

A. Original note.

Q. Secured by the mortgage which you are holding there?

Mr. McNabb: What mortgage are you holding?

Mr. Johnson: Plaintiff's Identification No. 2.

Q. (By Mr. Johnson): And were those instruments signed on the days that they bear date?

A. They were.

Q. Can you tell what date that was?

A. May 8, 1945.

Mr. Johnson: We now offer Plaintiff's Identification 2 and 6, if the court please.

Mr. McNabb: May I ask this witness a question or two, your Honor, in reference to these items.

Cross Examination

Q. (By Mr. McNabb): How many notes were signed on the 8th day of May, 1945 by A. L. Kaye and Jean Kaye, if you know, Mr. Bailey?

A. I do not know.

Mr. Johnson: We don't see that that is proper in questioning on this matter.

Mr. McNabb: They are attempting to admit two notes here signed on the same day, each for ten thousand dollars. They appear to bear regular or proper signatures by A. L. Kaye or by Jean Kaye.

Mr. Johnson: All of the executions of these [11] instruments have been admitted, your Honor, in the answer of the defendants. I don't see they are in any position to question it.

(Testimony of Ralph C. Bailey.)

The Court: All right, you are objecting to his question?

Mr. Johnson: Yes.

The Court: I will sustain the objection.

Q. (By Mr. McNabb): Mr. Bailey, is Plaintiff's Identification No. 6, that is a ten thousand dollar note, is that identification a copy of the note which is attached to the Plaintiff's Identification No. 2?

A. It is. This is the original note. This is the copy.

Q. The note which is attached to the copy is a mortgage then? A. That's right.

Clerk of Court: Keep your voice up, Ralph, please.

Mr. Bailey: That is correct.

Q. (By Mr. McNabb): And though this is or appears to be an original signature which is on Plaintiff's Identification No. 2, this is not, you are not admitting in evidence at this time two ten thousand dollar notes, but one original and one copy; is that correct? A. That's right. [12]

Mr. McNabb: No objection to the admission of those identifications.

The Court: Be admitted.

Clerk of Court: Identification No. 2 is Plaintiff's Exhibit "B" and Identification No. 6 is Plaintiff's Exhibit "C".

(Plaintiff's Identification No. 2 was received in evidence as Plaintiff's Exhibit "B".)

(Testimony of Ralph C. Bailey.)

(Plaintiff's Identification No. 6 was received in evidence as Plaintiff's Exhibit "C")

Q. (By Mr. Johnson): I will hand you Plaintiff's Identification No. 3, and ask you what that is, if you know? A. Chattel mortgage.

Q. Signed by whom?

A. A. L. Kaye and Jean Kaye, A. L. Kaye, attorney in fact.

Q. And anyone else on it?

A. And Phillip A. Johnson.

Q. Do you have a note which is secured by that mortgage? A. I do.

Q. Will you produce it, please.

Clerk of Court: Plaintiff's Identification No. 7.

(Mortgage Note dated November 22, 1948, was marked Plaintiff's Identification No. 7.)

Q. (By Mr. Johnson): I will show you Plaintiff's Identification No. 7, and ask you what that is?

A. It is a mortgage note.

Q. Is that, by whom is it signed?

A. A. L. Kaye, Jean Kaye by A. L. Kaye, attorney in fact.

Q. And is it in the same condition now as it was at the time it was signed practically?

A. It is.

Q. Is that note secured by the mortgage which is identified as Plaintiff's Identification 3?

A. It is.

Mr. Johnson: We now offer Plaintiff's Identification No. 3 and 7, if the court please.

Mr. McNabb: No objection, your Honor.

(Testimony of Ralph C. Bailey.)

The Court: It will be admitted.

Clerk of Court: Identification No. 3 is Plaintiff's Exhibit "D" and Identification No. 7 is Plaintiff's Exhibit "E".

(Plaintiff's Identification No. 3 was received in evidence as Plaintiff's Exhibit "D".)

(Plaintiff's Identification No. 7 was received in evidence as Plaintiff's Exhibit "E".) [14]

Q. (By Mr. Johnson): I will hand you Plaintiff's Identification No. 4, will ask you what that is, if you know? A. Mortgage.

Q. Signed by whom?

A. A. L. Kaye and Jean Kaye and R. C. Bailey, at that time cashier.

Q. And do you have a note secured by that mortgage in your possession? A. I do.

Q. Will you produce it, please.

Clerk of Court: Plaintiff's Identification No. 8.

(Mortgage Note dated January 30, 1950, was marked Plaintiff's Identification No. 8.)

Q. (By Mr. Johnson): I will show you Plaintiff's Identification No. 8 and will ask you what that is?

A. This is a mortgage note signed by A. L. Kaye and Jean Kaye.

Q. Is that secured by the mortgage there which you have marked Plaintiff's Identification 4?

A. It is.

Q. And is it in the same condition now practically as when it was signed? A. It is. [15]

(Testimony of Ralph C. Bailey.)

Mr. Johnson: We will offer in evidence Plaintiff's Identifications 4 and 8.

Mr. McNabb: No objection.

The Court: It may be admitted.

Clerk of Court: Identification No. 4 is Plaintiff's Exhibit "F" and Identification No. 8 is Plaintiff's Exhibit "G".

(Plaintiff's Identification No. 4 was received in evidence as Plaintiff's Exhibit "F".)

(Plaintiff's Identification No. 8 was received in evidence as Plaintiff's Exhibit "G".)

Q. (By Mr. Johnson): I will hand you Plaintiff's Identification No. 5, will ask you what that is, if you know?

A. Real chattel mortgage.

Q. Signed by whom?

A. A. L. Kaye, Jean Kaye by A. L. Kaye, attorney in fact, and R. C. Bailey, at that time Vice-president.

Q. And do you have a note in your possession which is secured by that mortgage? A. I do.

Q. Will you produce it?

Clerk of Court: Plaintiff's Identification No. 9.

(Mortgage Note dated February 3, 1951, was marked Plaintiff's Identification No. 9.) [16]

Q. (By Mr. Johnson): I will show you Plaintiff's Identification No. 9, ask you what that is?

A. Mortgage note.

Q. Signed by whom?

A. A. L. Kaye and A. L. Kaye attorney in fact for Jean Kaye.

(Testimony of Ralph C. Bailey.)

Q. And is it in the same condition now as it was when it was signed, practically?

A. Yes.

Mr. Johnson: We would like to offer in evidence Plaintiff's Identifications 5 and 9, if the court please.

Mr. McNabb: No objection.

The Court: It may be admitted.

Clerk of Court: Identification No. 5 is Plaintiff's Exhibit "H" and Identification No. 9 is Plaintiff's Exhibit "I".

(Plaintiff's Identification No. 5 was received in evidence as Plaintiff's Exhibit "H".)

(Plaintiff's Identification No. 9 was received in evidence as Plaintiff's Exhibit "I".)

Clerk of Court: There is one of those that isn't marked, Mr. Johnson. Identification 9 hasn't got the Exhibit number on it.

Mr. Johnson: Oh, I beg your pardon. [17]

Q. (By Mr. Johnson): Mr. Bailey, have you had occasion to compute the amount of principal and interest due on Plaintiff's Exhibit "C", "E", "G", and "I"? A. I have.

Q. Will you tell the court what that is in each instance?

Mr. McNabb: I am going to object to that as having no bearing upon the issues of this case, no proper foundation laid for it, your Honor.

Mr. Johnson: I think, if the court please, that he certainly has the right to tell what is due and

(Testimony of Ralph C. Bailey.)

owing on each of the notes. That is in issue in the case.

Mr. McNabb: That question is not in issue here.

Mr. Johnson: Well, it has been denied in each of the answers. I would say it was an issue.

The Court: Objection overruled.

Q. (By Mr. Johnson): Will you tell the court, how much is due and owing on each of those notes, as of today, in principal and interest?

A. Note dated May 8, 1945, principal five hundred forty-six dollars, eighty-seven cents.

Mr. McNabb: Now just a moment, Ralph, please. What is the number of that note?

Mr. Bailey: Identification—(Interrupted)

Mr. Johnson: Exhibit it would be. [18]

Mr. Bailey: "C".

Mr. McNabb: That is note M-39?

Mr. Bailey: That is our number, yes.

Q. (By Mr. Johnson): Five hundred forty-six dollars, eighty-seven cents in principal?

A. That's right.

Q. And have you computed the interest to date?

A. To date four dollars, forty-nine cents.

Q. Now on the next one?

A. Note dated November 22, 1948, Exhibit "E", principal unpaid balance forty one hundred dollars, interest to date, thirty-three dollars, seventy-one cents. Note dated January 30, 1950, Exhibit "G", five thousand dollars is the unpaid principal, interest to date forty-one dollars, eleven cents. Note dated February 3, 1951, Exhibit "I", principal un-

(Testimony of Ralph C. Bailey.)

paid balance eleven hundred fifty dollars, sixty-two cents, interest to date nine dollars, forty-five cents.

Q. Is that amount, are these respective amounts now due and owing on these notes?

A. To date, yes, sir.

Q. Is the Bank of Fairbanks the owner and holder of the notes and mortgages to which you have just, about which you have just testified?

A. They are.

Mr. Johnson: You may cross examine. [19]

Cross Examination

Q. (By Mr. McNabb): Mr. Bailey, I believe that this action was instituted on the 21st day of April 1952, an action to foreclose these mortgages. I will show you now Plaintiff's Identification No. 6 which is a promissory note apparently your number, that is bank's number M-39, a note in the amount of ten thousand dollars and I will ask you how long prior to the institution of this action there has been no payment made on this note. The balance on it, as I recall, there was nine hundred for quite a long length of time, was it not?

A. That is correct.

Q. On what date was the balance of that note reduced to nine hundred dollars?

A. That was a series of payments from June 11, 1945 to——

The Court: A little louder, please.

Mr. Bailey: It was a series of payments received

(Testimony of Ralph C. Bailey.)

from June 11, 1945 being the first one, down to nine hundred which was June 3, 1949.

Q. And from June the 3rd, 1949, how long was it until a payment was made on that note?

A. Principal payment?

Q. Yes. A. February 20, 1954.

Q. So then from June of '49 until February '54 there was no payments made? [20]

A. No principal payments.

Q. No principal payment, and then therefore, at the time that this action was filed in April of '52 there had been no payment made on that note for more than two years, or nearly three years, is that right? A. That's right.

Q. Now, there have been some payments made on the interest on this note, has there not?

A. There has.

Q. Do you know who made those payments?

A. Yes.

Q. Who made them? A. A. L. Kaye.

Q. He made those payments in accordance with this instrument, did he?

A. Well, that's right. Well, not exactly. I mean, the note calls for interest quarterly.

Q. I say though, Mr. Kaye has made the payments as are indicated on this note?

A. That's right.

Q. In what fashion did he make those payments? A. Several fashions.

Q. Well, let me ask you this, the note indicates that on the 18th of July, of 1954 there was a pay-

(Testimony of Ralph C. Bailey.)

ment in the amount of three dollars, sixty-four cents applied toward the interest on this note. Now, how did Mr. Kaye make that payment? [21]

A. I did not receive the payment myself. However, it was by one method on that, proceeds received on a certain escrow held by the Bank of Fairbanks to be applied to the note.

Q. And what escrow is that?

A. Without having the record, I can't quote it.

Q. Do you know the parties to that escrow?

A. I do.

Q. Who are they?

A. Josephine Boussard as purchaser of a piece of real estate and A. L. Kaye as the seller.

Q. Is that the same piece of real estate that is subject to the mortgages which you are here presently attempting to foreclose? A. It is.

Q. Now, there have been, I will show you now then Plaintiff's Exhibit "E" which is a note apparently in the sum of sixty-three hundred dollars, your note M-180 dated the 22nd day of November, 1948. That note provides that it is to be paid in five hundred dollars per month installments from what date, when was the first installment to be paid on that note? A. December 22, 1948.

Q. Was that installment made? A. No.

Q. Did you ever receive a five hundred dollar installment on that note, payment on the principal?

A. No. [22]

Q. It was never paid in accordance with its terms at all? A. It was not.

(Testimony of Ralph C. Bailey.)

Q. What is the unpaid balance of that note as of this date? A. Forty-one hundred.

Q. When did you first receive a payment on the principal of that note? A. April 28, 1950.

Q. How many, in what amount was that payment? A. Five hundred dollars.

Q. And how many of those payments did you receive?

A. Five three hundred dollar payments.

Q. Let me ask you this now, on the 9th day of November, 1951, how far in default was that note?

A. What date again, please?

Q. The 19th of November, 1951?

A. Forty-one hundred dollars.

Q. And that is the present amount in which that note is in default, has not been altered since that date? A. That's right.

Q. Is the interest current on that obligation now? A. Yes.

Q. Do you know was the interest current on that obligation on the 19th of November, 1951?

A. Yes. [23]

Q. It was. It was far in default in principal?

A. Right.

Q. By a period of several years, never had been paid in accordance with its terms so far as principal was concerned, had it? A. No.

Q. Now, I will show you Plaintiff's Exhibit "G" which is your note number 422. This is a note in the amount of five thousand dollars dated the 30th day of January 1950 and calls for an install-

(Testimony of Ralph C. Bailey.)

ment payment of one thousand dollars on or before the 1st of December, 1950; according to the schedule of payments on that instrument was that payment made? A. No, it was not.

Q. Have any payments on principal been made on that obligation? A. No.

Q. I note here however on the 11th day of December, 1953, I think perhaps we should go back. On the 21st day of December, 1950 there was paid one hundred dollars as interest on that note. That is the first substantial or sizeable payment that you received as interest; do you know the source of that payment or the source of the funds for that payment?

A. Paid by Kaye, but how I cannot answer. I do not know.

Q. How do you know that Mr. Kaye made the payment? A. That I cannot answer. [24]

Q. Then you don't know that Mr. Kaye did in fact make the payment?

A. I would assume so.

Q. But you don't know. When was this contract between Mr. and Mrs. Kaye and Josephine Boussard executed?

A. I do not remember. I do not have the papers.

Q. You could get those papers though, could you not? A. Yes, I could.

Q. Now then, now the Plaintiff's Exhibit "I" is bank note number M-483, a five thousand dollar note, and dated February the 3rd, 1951. Mr. Bailey, according to the schedule of payments here, the

(Testimony of Ralph C. Bailey.)

first payment on principal of that note was made November 9, 1951, in the amount of six hundred six dollars, sixty-seven cents and since that time payments have been made regularly on the principal of the note as well as the interest. Do you know who has made those payments?

A. Yes. Mr. Kaye one way or the other. There are several ways that he can make these payments, but indirectly Kaye makes the payments.

Q. Indirectly?

A. Directly or indirectly. There are several ways to acquire funds to make the payments on the note.

Q. Now then, let me ask you this, do you know of your own knowledge whether Mr. Kaye has ever since the 9th day of November 1951, do you know whether since the 9th of November '51 Mr. Kaye has ever come to your bank and made any payments [25] of principal or interest?

A. No, I do not know.

Q. Well, will not your records disclose that?

A. No, because there are several ways we can receive the payments and Mr. Kaye can come in and make the payments himself direct, they could be received from a certain escrow by the sale of this property.

Q. Mr. Bailey, let me ask that in another fashion. Do you not know that since the 9th day of November of 1951 that Mr. Kaye has not come to your bank and made any payments by cash or by check on any one of these four notes?

A. I don't know.

(Testimony of Ralph C. Bailey.)

Q. You know that he has not, don't you?

A. No, I don't know that.

Q. Will your records or the records of the bank indicate whether or not you have received any cash or any checks from Mr. Kaye to apply to these notes?

Mr. Johnson: If the court please, it seems to me that he is beginning to argue with the witness. These exhibits have been introduced. They are identified and they are admitted in evidence. They are the bank's records showing these payments. We object, not proper cross examination.

The Court: Objection overruled.

Q. (By Mr. McNabb): Won't your records so indicate, Ralph?

A. No, I can't tell whether Mr. Kaye came directly to [26] the window and paid me cash in it, or we received funds from other instruments. I did not handle all the transactions. We have other employes that handle them. Therefore, I cannot answer your question.

Q. You don't know? A. No.

Q. Can you tell us, Ralph—(Interrupted)

The Court: Would you like a recess for a few minutes now?

Mr. McNabb: Yes, your Honor.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 10:50 a.m., the court took a recess until 11:00 a.m., at which time it reconvened and the trial of this cause was resumed.)

RALPH C. BAILEY

the witness on the stand at the time the recess was taken, resumed the stand for further

Cross Examination

The Court: Counsel ready to proceed?

Mr. McNabb: Defendant is ready, your Honor.

Mr. Johnson: Plaintiff is ready.

Q. (By Mr. McNabb): Now, Mr. Bailey, I will hand you Plaintiff's Exhibit "E". That was a note dated November 22nd, 1948, is that right, sir?

A. That's right. [27]

Q. Payable in installments of five hundred dollars per month, is that correct, sir?

A. Correct.

Q. The note is for sixty-three hundred, is that right? A. It is.

Q. The last payment on that note was December 21st, 1950, is that correct? A. It is.

Q. May I see the instrument, please. Mr. Bailey, this instrument, a schedule of payments made on this note which is Plaintiff's Exhibit "E", is that schedule of payments correct? A. It is.

Q. The note indicates, I believe, that between the 16th day of March, 1951, and the 11th day of, the 9th day of November, 1951 that no interest was paid, is that correct, sir?

A. Would you repeat, please?

Q. There was no interest paid on that note between the 16th day of March and the 9th day of November, is that correct? A. Of what year?

(Testimony of Ralph C. Bailey.)

Q. 1951? And the 9th day of November, '51, no interest was paid on it?

A. Yes, there was. There was interest received in March 1, 1951, and then the next interest received was in October 1, 1951.

Q. What are these dates here then?

A. These are the dates that we received it. These are [28] the dates that the interest was received. These are the dates that the interest was paid to.

Q. Yes, this column interest was paid to, it is clearly designated on the notes?

A. That's right.

Q. This is the date that the payments were made in a column headed date?

A. Right.

Q. Then here March 16, '51, that is when you received an interest payment, is it not?

A. That's right.

Q. There was no interest paid then between the 16th day of March '51 and the 9th day of November 1951, is that correct?

A. That is right.

Q. All right, and there had been no payment as against the principal since the 21st day of December of 1950? A. That's right.

Q. Do you know the source of the funds that made the payment on the interest on the 9th day of November of 1951?

A. Not without checking the files.

Q. You can secure that information for us?

(Testimony of Ralph C. Bailey.)

A. I believe we can.

Q. You will do that this afternoon or prior to the time that the court convenes again at two o'clock?

A. Yes, sir.

Q. I hand you now Plaintiff's Exhibit "I" which is a [29] note in the amount of five thousand dollars, is that not correct?

A. That is right.

Q. Dated February 3, 1951?

A. That is right.

Q. Payable in one year?

A. That's right.

Q. What is the present outstanding balance of that note?

A. Eleven hundred fifty dollars, sixty-two cents.

The Court: Eleven did you say?

Mr. Bailey: Eleven hundred.

Q. (By Mr. McNabb): When was the first payment on the principal of that note?

A. November 9, 1951.

Q. Do you know the source of that payment, sir?

A. Not without checking the records, other records we have at the bank.

Q. That will, you will do that before two o'clock?

A. Yes.

Q. May I see the instrument again, please. I hand you now Plaintiff's Exhibit "G", that is a note dated January 30, 1950, is it not?

A. It is.

Q. In the principal amount of five thousand dollars? [30]

A. It is.

(Testimony of Ralph C. Bailey.)

Q. Payable December the 31st, 1950?

A. Yes.

Q. There was no payment ever made on the principal of that note, was there?

A. There was not.

Q. Was the interest on that obligation ever brought current? A. It was.

Q. When was the interest brought current?

A. July 10, 1954, and various other intervals.

Q. Let me ask you this then, when was the interest first brought current on that note?

A. March 1, 1950.

Q. When was the next time that the interest was brought current on it?

A. April first, 1950.

Q. Was there ever any interest paid for a period of longer than one month?

A. Yes, from October 1, 1950 to January 1, 1951.

Q. How much was that payment?

A. One hundred dollars.

Q. And then subsequently there was another hundred dollar payment, was there not?

A. There was.

Q. When was that? [31]

A. April 1st, 1951.

Q. And that paid the interest some days in advance, I believe? A. That's right.

Q. And the interest is now current on that obligation? A. It is as of this date.

Q. Now then, I will hand you Plaintiff's Ex-

(Testimony of Ralph C. Bailey.)

hibit "C", that is a note in the principal amount of ten thousand dollars, is it not?

A. Originally, yes.

Q. Dated May 8, 1945? A. That's right.

Q. Provides for payment in three hundred dollar monthly installments, is that correct?

A. Correct.

Q. The last payment on the principal of that note was 6-3-49, is that correct?

A. Not the last one.

Q. When the note was reduced to a principal balance of nine hundred dollars?

A. June 3, 1949.

Q. I was correct then? A. Yes.

Q. The interest on that obligation was well is current? A. It is.

Q. Now, Mr. Bailey, I will hand you the entirety of the [32] four notes upon which this action is based and ask you if it is not true that on the 9th day of November of 1951, the date that all of those notes were in default in both principal and interest—(Interrupted)

A. No, not both principal and interest.

Q. Which of the notes were not current in principal on the 9th day of November of 1951?

A. Exhibit "I", note dated February 3, 1951, interest current, principal in default. I beg your pardon. I stand to be correct. It was current on that note.

Q. The entire note?

A. Yes, in this particular case.

(Testimony of Ralph C. Bailey.)

Q. That is Exhibit "I", a five thousand dollar note payable in one year? A. That's right.

Q. And that was current as to both principal and interest on the 9th day of November, '51?

A. That's right.

Q. And was made so by, in what fashion?

A. Well, the interest was current on the, the note itself was not due and would not have been due until February 3, 1952.

Q. Well, was it current on the 8th day of November of 1951? A. Yes, sir.

Q. Well, what is this then, a payment up to the 8th day; [33] it was made current by a payment on the 9th day of November, was it not?

A. No, it was current before because it was current on October 13, 1951. He paid interest to October 8, 1951, and the note was current because as you will see our notes call for quarterly interest payments and it was within the quarter.

Q. There had been nothing paid on the principal at that time, had there been? A. No.

Q. And how much was paid on the 9th day of November on that note?

A. Thirty-three dollars, thirty-three cents in interest and six hundred six dollars, sixty-seven cents on the principal.

Q. Do you know who made that payment, sir?

A. Not without checking the records.

Q. And you can do that? A. I will try.

Q. So this note then was made current in principal and interest, that is Exhibit "I" was made

(Testimony of Ralph C. Bailey.)

current in principal and interest on the 9th day of November, '51, is that right? A. Correct.

Q. That is a note which would have been due by its terms on the 2nd day of February, 1952?

A. That's right.

Q. And up until the 9th day of November nothing had been paid on the principal of the obligation? [34] A. No.

Q. And on the 9th day of November six hundred six dollars, sixty-seven cents was applied toward the retirement of that note?

A. That's right.

Q. The first payment that had been made to that date? A. That's right.

Q. Between now and two o'clock you will ascertain for the court who made the payment or from what source the money came?

A. I will try.

Q. Now let me ask you, Mr. Bailey, I think perhaps I did, let me ask you this, was there not on the 9th day of November, 1951, a total of six hundred forty dollars applied toward the retirement of one or all of these four obligations?

A. It would appear so.

Q. Well, is there any payment on any of these other four on the 9th day of November, other three, I'm sorry? A. No, there isn't.

Q. Notes "G", "E" and "C", that is Exhibits "C", "G" and "E" were very badly in default or certainly in default in both principal and interest on November 9, 1951, were they not?

(Testimony of Ralph C. Bailey.)

A. That's right.

Q. Mr. Bailey, I believe you are familiar with a contract of sale between A. L. Kaye and Jean Kaye and the defendant in this action, Josephine Boussard, are you not, sir? [35] A. Yes.

Q. And that is in escrow in your bank?

A. Yes.

Q. I will ask you if you know whether Josephine Boussard is a party to more than one escrow in your bank, sir? A. Not off-hand, no.

Clerk of Court: Defendant's Identification A.

(Installment Payment Receipt Book was marked Defendant's Identification A.)

Q. (By Mr. McNabb): Mr. Bailey, I will hand you Defendant's Identification A and ask you if you know what that is, please?

A. Installment repayment book.

Q. Indicating what financial institution?

A. Indicating Bank of Fairbanks, it is a receipt book.

Q. As an escrow agent?

A. That's right, escrow number 691.

Q. In whose name?

A. Josephine Boussard.

Q. Now, I will, I call your attention to the first payment as is evidenced in that book, what date is that? A. November 9, 1951.

Q. What was the total amount that was paid on that day, Mr. Bailey?

Mr. Johnson: If the court please, until the identification is admitted in evidence it is, and wouldn't

(Testimony of Ralph C. Bailey.)

be [36] the best evidence. I don't see any justification for the witness—(Interrupted)

The Court: I think we could save time also if the whole matter were put in evidence, if we can.

Mr. McNabb: Yes, your Honor. Your Honor, I am going to move to admit Defendant's Identification A.

Mr. Johnson: We object on the grounds that it is incompetent, irrelevant and immaterial, and hasn't been properly identified or the proper foundation hasn't been laid for its introduction. There is no showing that the bank in any way was connected with these escrow as a party to any agreement other than as an escrow holder, and there is no showing that the parties here or the property is the same that is involved in this action.

The Court: Inasmuch as he is objecting to it now, Mr. McNabb, I think I will have to lay the foundation.

Mr. McNabb: Very well, Judge.

Q. (By Mr. McNabb): Mr. Bailey, this payment or schedule of payments indicates, I believe, that, well, you tell me what payment was made if any on the 9th day of November, 1951?

Mr. Johnson: We object to that, if the court please, on the grounds that it is incompetent, irrelevant and immaterial until this is admitted in evidence.

The Court: I think you should show the execution of the instrument first before the details are brought in. [37]

(Testimony of Ralph C. Bailey.)

Q. (By Mr. McNabb): Mr. Bailey, do you know the subject of the property which that payment schedule or that receipt book concerns?

A. I believe it concerns an escrow held by our bank and the original of which is placed in our permanent files.

Q. You know that it does, don't you?

A. I say I know providing this is the book that goes along with it. That I cannot prove until I see my records.

Q. You also no doubt know that it is the same property upon which you are here today attempting to foreclose a mortgage?

Mr. Johnson: We object to that as not being the best evidence.

The Court: Objection overruled.

Q. (By Mr. McNabb): Isn't that right, Ralph?

A. I can't tell. Anybody could make this out. Without checking my permanent record of the bank.

Q. No, of course, it isn't. Would you prefer to do that?

A. I prefer to use my own records.

Mr. McNabb: May we have a recess now until 1:30 during which time Mr. Bailey will have an opportunity to check his records.

The Court: We will adjourn until 1:30, but this case that we are trying now will be adjourned until two o'clock.

Clerk of Court: Court is at recess until 1:30. [38]

(Thereupon, at 11:30 a.m., a recess was taken until 2:00 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the recess.)

The Court: Bank of Fairbanks vs. Kaye; are you ready to continue the case?

Mr. Johnson: The plaintiff is ready, your Honor.

RALPH C. BAILEY

the witness on the stand at the time the recess was taken, resumed the stand for further

Cross Examination

Q. (By Mr. McNabb): Mr. Bailey, were you able to discover in your files or in the records of the bank any substantiating factors concerning this installment payment receipt book, number 691, about which I questioned you prior to the recess?

A. I think so.

Q. Do you know, do you now know then what this book is about? A. Yes.

Q. Who are the parties or what is that payment receipt book a part of, if you know?

A. Our escrow 691.

Q. And what is that, if you know?

A. It involves a selling and the purchase of a piece [39] of property by two other parties.

Q. And who are the parties to that?

A. A. L. Kaye and Jean Kaye, sellers, and Josephine Boussard as purchaser.

(Testimony of Ralph C. Bailey.)

The Court: What is the name of the purchaser?

Mr. Bailey: Josephine Boussard.

Q. (By Mr. McNabb): Now, Mr. Bailey, do you know whether the property involved in that escrow or that contract of sale is the property which is mortgaged to the Bank of Fairbanks and the subject of this action? A. It is.

Q. The same property? A. Yes.

The Court: Those escrow payments on the date they bear?

Mr. Bailey: I have not checked them back, your Honor, between ours and the payment book. I have not checked each individual payment but that payment book does represent this escrow on the fact of it.

Q. (By Mr. McNabb): You have reason to believe that the payments as applied against this contract of purchase and sale between each of the parties defendant here is represented in this book?

A. I have reason to think so. I wouldn't—(Interrupted)

Q. You do not know positively? [40]

A. Not without checking it out.

Q. But you do have there the record of the payments?

A. This is the bank's permanent record, yes.

Q. And do you know the date upon which the contract between Mr. and Mrs. Kaye, the defendants here, and Josephine Boussard, the other defendant, was executed.

Mr. Johnson: Well, if the court please, we be-

(Testimony of Ralph C. Bailey.)

lieve that the contract is the best evidence. We object.

The Court: Has that been put in evidence, yet?

Mr. McNabb: No, it has not, your Honor.

The Court: You might offer it and see if there is any objection to it.

Mr. McNabb: Let me have this. I don't know what this instrument is.

Clerk of Court: Defendant's Identification B.

(Contract of Purchase and Sale was marked Defendant's Identification B.)

Q. (By Mr. McNabb): I have had the instrument which you just handed me marked as Defendant's Identification B; do you know what that is?

A. Yes, it is a Contract of Purchase and Sale by and between A. L. Kaye and Jean Kaye, husband and wife, hereinafter called sellers, and Josephine Boussard, hereinafter called buyer.

Q. Is that contract and the deed to that property the subject of escrow number 691 in the Bank of Fairbanks? [41] A. It is.

Q. When was that contract executed, if you know?

A. The 9th day of October, 1951.

Q. When was it placed in escrow in your bank, if you know?

A. According to the letter here, October 9, 1951.

Q. According to your records, or the records of the bank, was there not the sum of six hundred forty dollars paid to the Bank of Fairbanks by

(Testimony of Ralph C. Bailey.)

reason of the existence of that contract on the 9th day of November, 1951? A. There was.

Q. What was done with the six hundred forty dollars? A. May I have the notes.

Q. These notes?

A. No, the original notes, the exhibits that have been placed in the court. They were applied to note dated February 3, 1951, our mortgage number 483, the note in the amount of five thousand dollars. It is Exhibit "I", six hundred six dollars, sixty-seven cents applied to principal and thirty-three dollars, thirty-three cents applied to interest.

Q. That was the note of Mr. Kaye?

A. That is correct.

Q. Who made that payment?

A. We did. The Bank of Fairbanks, pardon me.

Q. How did the Bank of Fairbanks come into possession of the six hundred forty dollars? [42]

A. These funds were received on this escrow 691 to liquidate the principal and interest, and we in turn have authority to apply these funds.

Q. Now, Ralph, just answer my questions. Confine yourself to answering. We are not interested in any long dissertations. How did you come into the money; how did the Bank of Fairbanks acquire possession of the six hundred forty dollars on the 9th day of November, 1951?

A. They were paid into the bank on escrow 691.

Q. By whom?

A. Presumably Josephine Boussard.

Q. And the entirety of it was paid on one of

(Testimony of Ralph C. Bailey.)

thes four notes? A. It was.

Q. And at that time that was the first payment that had ever been applied toward the payment of that, the principal of that particular note, was it not? A. Yes.

Q. You received an additional payment on escrow number 691 on the 10th day of December, 1951; the amount paid was five hundred thirty dollars, fifty cents. Is that correct?

A. On December 10, 1951, yes.

Q. What was done with that money?

A. Applied on note of five thousand dollars dated February 3, 1951, our mortgage note number 483, five hundred one dollars, twenty-one cents against principal and twenty-nine [43] dollars, twenty-nine cents against interest.

The Court: What is the exhibit number of that?

Mr. Bailey: Exhibit "I".

Q. (By Mr. McNabb): That is the same note against which the November 9 payment was credited? A. That is correct.

Q. And the entirety of each of those two payments was applied toward the indebtedness of Mr. Kaye to the bank? A. That's right.

Q. On February 11, 1952 you received three hundred four dollars, thirty-three cents; is that correct? A. Correct.

Q. What became of the proceeds of that payment?

A. Two hundred forty-seven dollars, forty-three cents was applied to the principal of Exhibit "I"

(Testimony of Ralph C. Bailey.)

and fifty-one dollars, ninety cents was applied to interest.

Q. Fifty-one dollars, ninety cents?

A. That is correct, according to the records.

Q. Mr. Bailey, what became of the other five dollars?

A. That I would have to check out here, and I would like to have some time to do so. According to the records here it says go to service charges, and the reason for it I can't tell you without checking further.

Q. Now then, on March 10th of 1952, you received a payment of three hundred fifty-two dollars, seventeen cents, did you not? [44]

A. My records do not indicate that amount of money.

Q. On the 10th day of March, 1952 the same note that we have been talking about, that is Exhibit "I" was credited against principal in the sum of two hundred seventy dollars, thirty-seven cents, and with interest in the amount of twenty-four dollars, thirty cents on the 10th day of March?

A. That's right.

Q. Your escrow records in this transaction 691 indicate I believe on the 10th day of March that a total of three hundred fifty-two dollars seventeen cents was paid? A. That is correct.

Q. What happened to the other fifty-seven dollars, fifty cents—that amount, Mr. Bailey, if I may interrupt you, that represents interest on Mr. Kaye's equity in the property in the amount of

(Testimony of Ralph C. Bailey.)

eleven thousand five hundred dollars at the rate of six per cent per annum for one month, does it not?

A. That's right, but what I did with it, that is what I am trying to establish now. Evidently I have not enough material here to establish it.

Q. I will tell you. A. All right.

Q. Two days later, and on the 12th day of March 1952 you applied that money against principal on our Exhibit "I", 3-12-52?

A. That's right.

Q. There wasn't any payment made by Josephine Boussard [45] on that date at all, was there?

A. That's right now that you call it to my attention.

Q. So you applied on that date as you had on each previous occasion the interest of Mr. Kaye as it accelerated on his eleven thousand five as is provided by the contract? A. That's correct.

Q. O. K. On April the 8th the bank received the sum of three hundred fifty dollars, eighty-four cents, did it not? A. It did.

Q. What did the bank do with that money?

A. Three hundred twenty-eight dollars, seventy-three cents was applied to Exhibit "I", twenty-two dollars, eleven cents was applied to interest to Exhibit "I".

Q. Now, in each of these instances, Mr. Kaye was entitled to fifty-seven dollars, fifty cents interest on his money under that contract, was he not?

A. Not the way we determined it, no.

(Testimony of Ralph C. Bailey.)

Q. Well, now, that is quite obvious, but it was, wasn't it?

Mr. Johnson: If the court please, I think that he is arguing with the witness. He has the escrow and contract there. That should speak for itself. If he wants to get the, if he wants to get it in evidence let him offer it. We have no objection.

The Court: Yes, don't indulge in mere argument.

Mr. McNabb: Very well, sir. [46]

Q. (By Mr. McNabb): Ralph, the contract, the subject of this escrow that we are talking about, 691, provided for the payment to Mr. Kaye of the sum of eleven thousand five hundred; is that correct?

A. I would have to re-read the contract. I can't remember what was in it.

Q. Now, you just told me that the fifty-seven dollar fifty cent amounted to six per cent of eleven five for one month? A. That's right.

Q. Then the contract does provide for the six per cent interest on Mr. Kaye's eleven five?

A. Yes, it provides for it, the contract does.

Q. And on each one of the payments that was made from the 9th day of November up to the one we are now discussing, that is 9 November to 8 April Mr. Kaye was entitled to receive under the terms of that contract fifty-seven dollars, fifty cents a month?

A. We did not understand it that way.

Q. Be that as it may, the fifty-seven, fifty each month was applied against these notes in this in-

(Testimony of Ralph C. Bailey.)

stance, note "I"? A. That's right.

Q. That is Exhibit "I", Plaintiff's Exhibit "I"?

A. That's right.

Q. Now, in April, this April 8th payment in the amount of three hundred fifty dollars, eighty-four cents was applied in what fashion, sir?

A. State that amount again, please?

Q. Three hundred fifty dollars, eighty-four cents. That is April 8. You will find, Ralph, that that was applied on the 16th day of April to your Exhibit "I". A. Yes, that's right.

Q. Paid on the 8th and applied on the 16th. Now, your escrow records will show that there was a payment made on May 10th on the escrow?

A. That's right.

Q. Another on June 5? A. Yes.

Q. Another on July 11? A. That's right.

Q. Another on July 21, or on July 21 you distributed the proceeds of those payments?

A. That's right.

Q. How much money did you distribute on the 21st of July and where did it go?

A. Eight hundred eighty-eight dollars and nine cents was applied to principal on Exhibit "I"; sixty-nine dollars and seventy-three cents applied to interest on Exhibit "I".

Q. Is that all of the money that you collected from [48] May the 10th, June the 5th, and July 11th?

A. No, there is an overage there. It appears I have put one hundred dollars to interest. It is in

(Testimony of Ralph C. Bailey.)

the record some place, I believe. I haven't the time to dig it out.

Q. Well, now, something happened to eighty-six dollars, sixty-nine cents? A. Yes, sir.

Q. You accepted on this escrow between the 10th of May '52 and the 11th of July '52 the gross amount of one thousand forty-four dollars, fifty-one cents, and you applied nine hundred fifty-seven dollars eighty-two cents to Exhibit "I"?

A. That's right.

Q. Now, we have caught you short five dollars on February 11, and now I want to know what happened to eighty-six dollars, sixty-nine cents?

A. I could not answer that until I checked further.

Q. Mr. Bailey, in what amount was Mr. Kaye indebted to the Bank of Fairbanks on the 8th day of November, 1951?

A. Twenty thousand dollars.

Q. Well, now, that isn't correct, Ralph?

A. Beg pardon?

Q. It was five thousand dollars on M-423, Exhibit "G", against which there had been no payment on the principal? A. Right.

Q. There was only nine hundred on Exhibit "C", which is M-39? [49] A. Right.

Q. Then there was another five thousand dollars due on Exhibit "I", which is M-483, and there was forty-eight hundred on M-180, which is Exhibit "E"?

(Testimony of Ralph C. Bailey.)

A. My records here indicate here there was forty-one hundred.

Q. Forty-one hundred, so there really wasn't twenty thousand, it was only fifteen thousand even?

A. I beg your pardon. That's right.

Q. And each of those notes at that time, that is on the 8th of November '51, each was past due. No one was not past due; all of them were past due with the exception of Exhibit "I"?

A. That's right.

Q. Which was the last of the notes, that correct? A. That's right.

Q. And some of them had been past due since 1948? A. That's right.

Q. And not even the interest was current on those notes as of the 8th day of November, '48?

A. Correct.

Q. I beg your pardon now, '51, November the 8th '51 they were in default in principal and interest both, with the exception of Exhibit "I"?

A. Yes.

Q. Now, do not your records indicate that Josephine [50] Boussard, who purchased the interest of Mr. and Mrs. Kaye had been quite prompt in making all of the payments due under that contract? A. That's right.

Q. Since the 9th day of November '51?

A. Yes.

Q. Can you tell the court how much she had paid in on that contract since the 9th day of November, 1951? A. Including interest?

Q. Yes.

(Testimony of Ralph C. Bailey.)

A. I would like to have an adding machine.

Q. Well, she has paid, not counting the last payment, she has paid sixty-six hundred dollars on the principal, hasn't she?

A. I don't know without checking.

Q. I want you, Ralph, we can take a recess here in a moment, I ask you if it is not true that since the 9th day of November of 1951 Josephine Boussard has paid you the sum of eleven thousand fifty-three dollars and thirty-seven cents as principal and interest on this property, eleven thousand fifty-three dollars thirty-seven cents on notes that had been in default since 1948?

Mr. McNabb: Your Honor, may we have a ten minute recess at this time.

The Court: Will that be enough?

Mr. Bailey: Not likely. [51]

The Court: How about twenty minutes. Is that more like it?

Mr. Bailey: I will try to get it out in twenty minutes.

The Court: We had better take thirty.

Mr. Bailey: Your Honor, it will take actually longer than that because we will have to go back and check each one of these payments out where they have been credited or given directly to Kaye, if there were any, and find out where this money has gone to and that is half a day's work the way this is set up.

The Court: Well then, as I understand you, you

(Testimony of Ralph C. Bailey.)

need a recess from now until about tomorrow morning, is that right?

Mr. Bailey: It will take, well, just about, your Honor. It will take at least two hours. There are payments over a period here of approximately, a little over three years.

The Court: We will take a recess until tomorrow morning at ten o'clock.

Mr. McNabb: Judge, for the purpose of saving a little time here, may we just go into this matter a little further and perhaps save time tomorrow, sir?

The Court: Well, yes, I am certainly in favor of any saving of time.

Mr. McNabb: Well, if we can have a five or ten minute recess now and save that much time.

Clerk of Court: Court is recessed for five minutes. [52]

(Thereupon a short recess was taken.)

The Court: Are you ready to proceed?

Mr. Johnson: We are ready.

RALPH C. BAILEY

the witness under examination at the time the recess was taken resumed the stand for further

Cross Examination

Q. (By Mr. McNabb): Now, Mr. Bailey, on the 8th day of November, 1951, Mr. Kaye was indebted to the bank, that is the defendants Kaye were indebted to the bank fifteen thousand dollars; you

(Testimony of Ralph C. Bailey.)

have already testified to that, that that is correct, is it not? A. Yes.

Q. Now then, on the date that, or the complaint which you filed in this action on the 21st day of April of 1952, does not ask a judgment in the amount of fifteen thousand dollars; do you know whether Mr. Kaye had paid you anything between those two dates?

A. According to the notes, yes.

Q. But you have testified now that the payments which were received under escrow 691 were applied against those notes? A. Yes.

Q. Now then, did Mr. Kaye pay you anything?

A. No. Over and above the escrow I presume you mean.

Q. Could you tell us with any sort of convenience the [53] amount of money that has been paid or received by the bank after Josephine Boussard started making her payments on the 9th of November '51, and the 21st day of April when this action was instituted?

Mr. Johnson: If the court please, it seems to me that that is part of the information the witness wanted time to compute and I don't think that the question is fair at all. I object to it.

Mr. McNabb: Well, if he needs the time that is all right. We will go into that.

Q. (By Mr. McNabb): Do you need some time in which to make that computation, Mr. Bailey?

A. The only records I have are what is in my hand and according to these records here I received

(Testimony of Ralph C. Bailey.)

no money from Mr. Kaye other than moneys received through escrow 691.

Q. That doesn't answer my question, Ralph. I asked you if you know how much you received from escrow 691 from the first day that Josephine Bousard made any payments, that is on the 9th of November, and the date upon which this action was filed, that is the 21st of April?

A. No, not without computing.

Q. Do you need to take some extra time to do that or could you make an accurate and quick computation?

A. May I ask between what dates?

Q. Well, it would be between the 9th of November and [54] including the 8th of April?

A. Approximately two thousand one hundred seventy dollars, eighty-four cents.

Q. Two thousand one hundred seventy-seven dollars, eighty-four cents, isn't it, Ralph?

A. I could have made an error.

Q. Six forty and three fifty, three hundred four dollars thirty-three cents, three hundred two dollars, seventeen cents, and three hundred fifty dollars, eighty-four cents?

A. You are reading a combination of the principal and interest. I have it broken down separately.

Q. Separate?

A. There is a differential of five dollars here and possibly another five dollars or two that I missed in computing here.

(Testimony of Ralph C. Bailey.)

Q. So in approximately five months the fifteen thousand dollar indebtedness of Mr. Kaye has been reduced by the sum of twenty-one hundred seventy dollars? A. That's right.

Q. By the bank having applied the proceeds of escrow number 691 against it?

A. That is correct.

Q. Now then, we discussed for only a moment the matter of the fifty-seven dollars fifty cents interest which there seems to be a conflict concerning. The contract provides that Mr. Kaye is to receive six per cent interest. [55]

Mr. Johnson: Now if the court please, I object to counsel testifying. The contract isn't even in evidence yet. He has merely identified it. He hasn't even offered it.

The Court: Objection overruled.

Q. (By Mr. McNabb): The contract provides, Mr. Bailey, that Mr. Kaye is to receive six per cent interest on eleven thousand five hundred, that is six per cent per annum; is that not correct?

A. That's right.

Q. Now then, a few moments ago you told me that that was not your interpretation, did you not so testify?

A. If I did it was in error in the way the question was put to me because on the eleven thousand five hundred he is entitled to six per cent interest. However, the bank is entitled to the six per cent interest on eleven thousand five hundred.

Q. Mr. Kaye is entitled to receive it and the

(Testimony of Ralph C. Bailey.)

bank is entitled to get it? A. That's correct.

Q. And you have been getting it?

A. That's right.

Q. And you have since the 9th day of November of 1951 when Josephine Boussard first started making payments under escrow 691, the bank then has received the entirety of the money she has paid under that escrow?

A. I cannot answer that question.

Q. Let me ask you this, has Mr. Kaye received any of it? [56]

A. I cannot answer that until I compute the disbursements of funds received.

Q. Let us for a moment now go again to Exhibit "I", that exhibit will show that on the 21st day of July, 7-12-52, there was applied against the principal the gross amount of eight hundred eighty-eight dollars, nine cents, and against interest the sum of sixty-nine dollars, seventy-three cents. Will you please verify those figures against the payment schedule on Exhibit "I"? A. That's correct.

Q. Now, the sum of eighty-six dollars, sixty-nine cents excepted, the sum of principal and interest as applied against Exhibit "I" on the 21st of July represents the payment made by Josephine Boussard on the 10th of May, the 5th of June and the 11th of July?

A. According to my records that's correct.

Q. In what suspense or other account was that money held during the period that each of the payments were made?

(Testimony of Ralph C. Bailey.)

A. I cannot answer that question today. I will have to think about it. I don't know.

Q. Do you, you do, of course, know that from the day upon which the lady made her first payment until the action was filed, this foreclosure action, you immediately applied all of the proceeds, all of the moneys that she paid directly toward the retirement of the secured indebtedness of Mr. and Mrs. Kaye to the bank, do you not? [57]

A. It appears that way.

Q. Now, if there is any doubt in your mind I want you to look at identification, or Exhibit No. "I" and testify positively?

A. Would you restate your question again, please.

Q. All of the moneys paid by Josephine Boussard on escrow 691 between the 9th day of November 1951, to and including her payment on the 8th day of April 1952 were applied directly toward the retirement of the secured indebtedness owed by Leo Kaye and Jean Kaye to the Bank of Fairbanks? A. No.

Q. What sum was not so applied?

A. That is why we ask for computation.

Q. I will qualify my statement to the five dollars which we were short, was there any other money that was not so applied?

A. From my figuring here, yes, there is a difference here some place and we have to find it.

Q. Are you talking about the eighty-six, sixty-nine? A. Yes.

(Testimony of Ralph C. Bailey.)

Q. That was between the 10th day of May and the 21st of July, Ralph? A. I am confused.

Q. I am not.

A. Well, no, I am asking you what dates are you saying, clear back to November 9, '51, until——?

Q. Until the action was filed on the 21st of April. You see, there was the November, December, February, March and April payments, the ones that we were just talking about in the sum of twenty-one hundred seventy dollars, eighty-four cents, or thereabouts. You and I this morning went very carefully through these payments, and the payment schedule on Exhibit "I" and concluded at that time that all of the moneys paid under escrow 691 were applied to Exhibit "I". A. Yeah.

Q. That's correct, isn't it?

A. That's correct.

Q. Now then nothing happened, that is after the April 8th payment you filed this action on the 21st of April. The last payment was on the 8th day of April and you have applied the entirety of that payment, three hundred fifty dollars, eighty-four cents, you applied that to the debt of Mr. Kaye as evidenced by Exhibit "I". That was on the 8th of April. Your receipt on Exhibit "I" shows that that was applied on the 16th. There was a lapse of eight days. We don't know why, but that occurred. After the 8th of April payment, thirteen days later you filed an action to foreclose the mortgages. That was the 21st of April. On May the 10th, June 5th, July

(Testimony of Ralph C. Bailey.)

11th, you did not apply the payment. Do you know why you didn't apply them?

A. No, I don't right offhand. That is one thing I want to substantiate.

Q. Do you know then why you did apply them on July 21st? [59]

A. Also I will have to substantiate that.

Q. When did you first become aware of the existence in escrow in your bank of escrow number 691?

A. The date that we received the escrow in the bank.

Q. You knew about it then, on that day?

A. Some official in the bank knew about it, yeah.

Q. You did not know about it?

A. Well, I think I did. I am not positive. That is a number of years ago.

Q. Do you know who deposited the deed and the contract in escrow? A. I did not remember.

Q. You have no recollection of that having been done?

A. No, not that particular transaction. No.

Q. Do you have any recollection of having discussed it on the day that it was put in the bank with any person?

A. I possibly could have, but offhand, no, I can't recollect what happened on that particular day.

Q. Do you know whether Mr. Kaye since escrow number 691 was deposited in your bank has ever made a payment on any of these notes?

A. That I cannot determine until I make a com-

(Testimony of Ralph C. Bailey.)

plete check. I don't think that he has. I mean directly.

Q. Your records indicate, however, that the payments have been made consistently on 691?

A. Yes, without checking any further. I haven't checked [60] it out through month by month, but it appears to be.

Q. And the balance of our very controversial Exhibit "I", which was due in the amount of five thousand dollars, or was not due nor quite due when Josephine Boussard took over, the unpaid balance of that has been reduced from the sum of five thousand dollars to eleven hundred fifty dollars as of the 18th of July, correct?

A. According to the note, yes.

Q. Now, the note is the best evidence. You have no other evidence of the amount of the debt?

A. No, that's right.

Q. So that is it whether it is according to the note or not? A. That's right.

Q. What date was that? A. As of July 18th.

Q. Do you know when the payment was made that, to the bank that was applied on the 18th against that note? A. 18th of July, '54.

Q. Yes, do you know when that payment was made?

A. According to the records, it was made July 10, '54, applied against the note.

Q. Applied the same day? A. Yes.

Q. Well, there is eight days difference, didn't you say the payment was made on the 18th? [61]

(Testimony of Ralph C. Bailey.)

A. Oh, I beg your pardon. That is correct. There is eight days difference which is not uncommon.

Q. Does that interest go on for those eight days?

A. It shouldn't.

Q. Well, I know it shouldn't, but does it? Is that like that elusive five bucks?

A. In this particular case it did.

Q. And so with the proceeds of the moneys that Josephine Boussard had been paying in here we have reduced that note to eleven hundred dollars or thereabouts. Nobody else but that lady has made any payments on the note, have they?

A. As I say, not to my knowledge.

Q. And your knowledge is pretty well correct on it, isn't it? You probably know more about this transaction than anybody else in this town, don't you, Ralph?

A. No, because I cannot, I don't remember these things, George.

Q. What?

A. I don't remember all these things. If anyone else has made any payments it is over and above, I don't know anything about it.

Q. You are pretty well sure where the money came from that made the payments though, aren't you?

A. Pretty sure.

Q. And we are keeping the interest current on this Exhibit "E", still shows a forty-one hundred dollar balance, but the interest is current on it?

A. That's correct.

(Testimony of Ralph C. Bailey.)

Q. And we finally got around to working on this 1945 note, I thought it was 1948. This is 1945, Exhibit "C", that is the one that had nine hundred dollars balance, wasn't it, on the 9th of November, 1951. It was six years old then and now we have got it down to five hundred forty-six dollars, eighty-seven cents? A. That's correct.

Q. But the best we can say for Exhibit "G" is that the interest is current and the five thousand dollars is still due? A. That's right.

Q. So actually there is right now nothing like the sum of fifteen thousand dollars due on these instruments, is there? A. No.

Q. Eleven fifty on one, which is Exhibit "I"?

Mr. Johnson: It seems to me, your Honor, that this is entirely repetitious. The witness has already testified two or three times as to the amount due and owing at the present time and the instruments speak for themselves, and show that anyway.

The Court: Well, it is very difficult to get this case produced all at once. I will have to overrule the objection.

Q. (By Mr. McNabb): So we have five thousand due on Exhibit "G", Ralph? A. Yes.

Q. Five hundred forty-six, eighty-seven on Exhibit "C"? [63] A. That's correct.

Q. Forty-one hundred on, what was that, "E"?

A. Identification "B", Exhibit 1.

Q. Let's see "E"?

A. Oh, yeah, Exhibit "E".

Q. And eleven hundred fifty dollars and sixty-two cents on "I"?

(Testimony of Ralph C. Bailey.)

A. Eleven hundred fifty dollars, sixty-two cents on "I", correct.

Q. What?

A. Eleven hundred fifty dollars, sixty two cents on "I".

Q. Yeah, so we then have not fifteen thousand but ten thousand seven hundred ninety-seven dollars, forty-nine cents presently due if my computation is correct? A. Correct.

Q. Which amount has been, the fifteen thousand with which we started on the 9th has been reduced every month in the principal amount of two hundred as is provided in the contract of Josephine Boussard; is that not correct?

A. That's correct.

Q. Plus interest on the entirety of all of your secured indebtedness at eight per cent per annum; is that correct?

A. Yes and no. Some of these funds could have been diverted to his bank account and not applied against the notes, and I would rather not answer it the other way without computing this band checking it out. I have no way of knowing off-hand. [64]

Q. Do you know, Ralph, whether you didn't get the fifty-seven fifty every month, that is the money that Josephine Boussard paid?

A. I am not sure of that, George.

Q. It is going to take quite sometime to make these calculations. You don't know now then when we, these three months that is, May, June and July of 1952, when you didn't apply any of the

(Testimony of Ralph C. Bailey.)

proceeds for three months and then you did on the 21st of July applied them, you don't know whether that has occurred since that time or not?

A. It could have. I would have to check it over.

Q. But you don't know at this time?

A. No.

Q. In any event, since the 8th day of November, 1951, the total indebtedness on these particular four notes of Mr. Kaye's has been reduced by about forty-two hundred dollars on principal. It was fifteen thousand dollars. Now we have decided it is ten thousand seven hundred ninety-one?

A. Approximately, yes.

Q. About forty-two hundred, and you are sure in your own mind at any rate that Mr. Kaye didn't make any of those payments to you?

A. I am not sure.

Q. You can ascertain that for us at the same time you make these other calculations?

A. I believe I can. [65]

Q. Let me ask you this, if any of the money was not applied against this indebtedness of Mr. Kaye's to you, what became of it?

A. It could have gone several other places, three mainly.

Q. Is there not provision in the escrow instructions for the payment to be made to the bank?

A. There is a provision, yes. It can be made several different ways.

Q. If then two hundred a month plus interest on these four notes was not applied toward the

(Testimony of Ralph C. Bailey.)

liquidation of the four notes, that is Exhibits "G", "E", "C", and "I", then the bank acted contrary to its instructions?

A. I will have to answer that yes or no. It depends.

Q. Well now then, what became of it if it wasn't applied?

A. It could have gone into his bank account and taken out by a check, withdrawn *from* him before we had the opportunity to take it back out and apply it against the note.

Q. There was no cause for it to go into an account, was there?

A. That is our means of keeping records. As a rule on about ninety-nine per cent of our accounts that we receive that way, and a bank is entitled to do so according to law.

Q. But if it got in there in Mr. Kaye's account and he did withdraw it when the bank placed it into his account, the account, the bank acted contrary to the escrow instructions as [66] provided in escrow 691, did it not?

A. No, not necessarily.

Q. In addition to our two other mysteries, those being the five dollar shortage, the eighty-six, sixty-nine shortage, we have another. Apparently from the amounts due on the exhibits there still remains to be paid the sum of ten thousand seven hundred eighty-seven dollars, forty-nine cents. We started with an indebtedness of fifteen thousand. If two

(Testimony of Ralph C. Bailey.)

hundred a month has been paid for thirty-four months there has been a total of sixty-eight hundred which should have been applied against the interest and against the principal of those four notes. We are off again. I would like you when you make your calculations to tell us, if you will, what became of that money. Do you understand me, Ralph? A. Yes.

Q. Actually, interest excluded, there should be presently a balance of eighty-two hundred, if we were correct and I assume that these notes are correct there should have been a balance presently due on these four notes of eighty-two hundred. The notes themselves indicate a present indebtedness in the sum of ten thousand ninety-seven dollars, forty-nine cents. You became though almost immediately aware of the deposit in your bank of escrow number 691, practically at the same time it was placed there, didn't you? A. That's right.

Mr. McNabb: Well, we are prepared to excuse the [67] witness at this time, your Honor. That is, he has calculations to make and we have no further questions to ask him at this time, sir.

The Court: Very well, you wish to continue with this and get certain payments you want him to prepare himself on certain points this evening?

Mr. McNabb: That is correct.

The Court: Very well. We will take an adjournment then until ten o'clock tomorrow morning.

Mr. McNabb: I have one other witness that I could put on at this time. Of course, we are not in

our case. That would be entirely up to Mr. Johnson.

Mr. Johnson: I have been wondering all along, Mr. McNabb, whether—(Interrupted)

Mr. McNabb: Just answer the question. Do you have any objection to our putting on another witness?

Mr. Johnson: Yes, I do.

Mr. McNabb: That is all for today, Judge. Your Honor, Mr. Bailey is going to need these notes.

Mr. Bailey: I will need these exhibits, your Honor.

Mr. Johnson: I was just wondering why all this was going on. I assumed that he had assumed the burden.

Mr. McNabb: Just answer the question. Do you have any objection to our putting on a witness now?

Mr. Johnson: Yes, I do.

Clerk of Court: Court is adjourned until tomorrow morning at ten o'clock. [68]

(Thereupon, at 4:30 p.m., August 16, 1954, an adjournment was taken to 10:00 a.m., August 17, 1954.)

Be It Remembered that the trial of this cause was resumed at 10:00 a.m., August 17, 1954, plaintiff and defendants both represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding.

The Court: Counsel ready to proceed with the trial of Bank of Fairbanks vs. Kaye, 7114?

Mr. Johnson: Plaintiff is ready, your Honor.

Mr. McNabb: Defendant is ready, your Honor.

The Court: Very well. Proceed.

RALPH C. BAILEY

the witness under examination at the time the adjournment was taken, resumed the stand for further

Cross Examination

Q. (By Mr. McNabb): Mr. Bailey, you came prepared this morning with your answers from your records concerning the matters which we discussed yesterday? Initially the five dollar shortage that developed to February 11, 1951?

A. That's right.

Q. Do you know what became of the five dollars?

A. It went into service charges.

Q. What service charge was that?

A. When an escrow is placed in the Bank of Fairbanks [69] for collection and we as a disinterested *thirty* party, our charges are five dollars for placing that escrow in the bank. That was not collected at the time we received the escrow, but deducted from payments received against the escrow which we are entitled to do.

Q. Who was charged with that five dollars?

A. Kaye.

Q. Mr. Kaye was charged with it?

A. Yes, sir, from the proceeds of funds received on the escrow which is his money.

Q. Did you make Mr. Kaye a receipt for that five dollars or in what fashion did you advise him?

A. That I cannot answer. I cannot answer that because I did not make the entry.

Q. Well, from what records did you get it, your information concerning that five dollars?

(Testimony of Ralph C. Bailey.)

A. From the general ledger of the bank and it was credited to the same.

Q. Would there, was there any record in Mr. Kaye's account indicating that that five dollars was used by the bank for the purpose of—(Interrupted)

A. Only a notation on the escrow itself that it had not been collected.

Q. That it had not been collected?

A. That's right.

Q. The point is, of course, that it has been collected? [70]

A. After we received it, yes, but not previously.

Q. Well, a notation on the escrow that the five dollars had not been collected would have been false. The five dollars was collected and used by the bank for the purpose of, and applied as a charge against the escrow account.

A. You misunderstand. A notation on the escrow itself at the time of setting up the escrow in the bank that the five dollars had not been received and it was some time later that we took it from the proceeds of the funds coming in on the escrow.

Q. When did you make that five dollar charge?

A. February 11, 1951.

Q. Is that the notation?

A. That is the notation.

Clerk of Court: Defendant's Identification C.

(Credit Slip was marked Defendant's Identification C.)

Q. (By Mr. McNabb): This then is the original charge slip?

(Testimony of Ralph C. Bailey.)

A. No, George, you misunderstand. That is part of the general ledger record and a permanent record of the bank. In other words, when we received the five dollars, which is a debit, this credit offsets the debit and it goes to our general ledger, but this is the day that it was done.

Q. Josephine Boussard received credit for having paid this, did she not? [71]

A. Yes, she received credit.

Q. On the escrow 691?

A. That's right. That was charged against Kaye.

Q. And the entirety of the payment with the exception of the five dollars was credited against Mr. Kaye's indebtedness to the bank?

A. That's correct.

Mr. McNabb: I move the admission of Defendant's Identification C.

Mr. Johnson: We have no objection.

The Court: It may be admitted.

Clerk of Court: Defendant's Exhibit No. "1".

(Defendant's Identification C was received in evidence as Defendant's Exhibit No. "1".)

Q. (By Mr. McNabb): Do you know, Mr. Bailey, why there was such a time elapsed between the date upon which the contract was placed in escrow as account number 691 and the date upon which that five dollar charge was made?

A. Failure of the teller to acquire it before that time.

Q. Oversight? A. Yes.

(Testimony of Ralph C. Bailey.)

Q. Now then, can you tell us what became of the eighty-six dollars, sixty-nine cents? [72]

A. Yes. At that time there were three monthly payments received. The amounts of three hundred forty-eight dollars, seventeen cents—(Interrupted)

Q. Wait a minute now. Which one was that three hundred forty-eight, seventeen?

A. May 10, 1952.

Q. May 10, 1952 you received three hundred forty-nine dollars, fifty cents?

A. That's correct. June 5th, let's put it this way, May 10, 1952 we received three hundred forty-nine dollars, fifty cents; June 5th, 1952 we received three hundred forty-eight dollars, seventeen cents; and on July 11, 1952 we received three hundred forty-six dollars, eighty-four cents, making a total of one thousand forty-four dollars, fifty-one cents.

Q. Right.

A. On July 9, 1952, the three hundred forty-eight dollars seventeen cents and the three hundred forty-nine dollars, fifty cents was credited to Mr. Kaye's account.

Q. On what date was that? A. July 9th.

Q. To his account?

A. To the account, and on July 10, 1952 we credited the three hundred forty-six dollars, eighty four cents. On July—(Interrupted)

Q. Wait a minute, just a minute now. What was that later date? [73]

A. July 10. In the meantime these funds were being held in a cashier check form.

(Testimony of Ralph C. Bailey.)

Q. Now, Mr. Bailey, that July payment which you credited on the 10th, it wasn't paid until the 11th.

A. Well, all I can do is go by my records here. It could have been received.

Q. Well, I know but let's go by these records. All right, according to our records it was received on July 10, 1953.

A. Beg your pardon. You are correct. I cannot answer that question.

Q. So then our entire theory concerning these three payments must be off?

A. Not according to the records.

Q. But you can't do something with a payment on the 10th day of July that wasn't paid until the 11th day of July?

A. Well, I don't see how it happened. It must be some kind of an error.

Q. But still we have the very elusive question of eighty-six dollars, sixty-nine cents.

A. That's right.

Q. What became of that?

A. July 21st we ran through a debit memo against this account for nine hundred fifty-seven dollars, eighty-two cents.

Q. And you had received one thousand forty-four dollars, fifty-one cents? [74]

A. That's right, and the differential was eighty-six, sixty-nine, and it stayed in the bank account.

Q. Whose bank account? A. Mr. Kaye's.

Q. You told me you had been holding these two first payments in the cashier's check form?

(Testimony of Ralph C. Bailey.)

A. I did, but at that time when I credited the account, which made a balance here we saved them.

Q. What date did you do that?

A. July 9th.

Q. You didn't have that amount of money there?

A. On July 9th I did.

Q. You didn't either, you had one thousand forty-four, fifty-one, but not until the 11th of July?

A. That's right, but I received these payments May 10th, if you recall, and June 5th.

Q. Yes, sir, and July 11th?

A. And July 9th. All right, July 9th I had a deposit of six hundred ninety-seven, sixty-seven.

Q. That's correct, but we are talking about the difference between nine hundred fifty-seven dollars, eighty-two cents, which you started playing with on the 21st of July?

A. That's correct. It is in the bank account. Would you care to see the records.

Q. On what day did you do something with nine hundred fifty-seven dollars, eighty-two cents? [75]

A. July 21st.

Q. Any time prior to that? A. No.

Q. Where had that amount of money been held?

A. Well, up until July 9th and July 10th, according to my records, it was held in the form of a cashier's check from the bank.

Q. How much money was that check for?

A. One was for three hundred forty-eight seventeen, and one for three hundred fifty-nine fifty. The other, according to these records that I hold

(Testimony of Ralph C. Bailey.)

in my hand, not yours, three hundred forty-six, ninety-four.

Q. And you had held that money in what fashion?

A. In the form of a cashier's check that time.

Q. The entirety of it? A. That's correct.

Q. How much money was that cashier's check; what do your records indicate to be the amount of the cashier's check?

A. Three hundred forty-eight seventeen; three hundred forty-nine fifty; and three hundred forty-six, eighty-four. There are checks, not check.

Q. Three checks then? A. Three checks.

Q. And then what did you do with those three cashier's checks?

A. I placed them at different intervals to the bank [76] account of A. L. Kaye.

Q. When did you do that?

A. July 9th both three forty-eight seventeen and three forty-nine fifty. On July 10 three forty-six eighty-four.

Q. Which, of course, must be in error, must it not?

A. It is evidently so. I mean, but it is pretty hard for a man to go ahead a day and use the 11th when he did something on the 10th. That I cannot imagine, George, for the simple reason that I have tellers down there that handle this. I did not personally handle it.

Q. I know, but so you had these three cashier's checks? A. Yes.

(Testimony of Ralph C. Bailey.)

Q. And on the 10th day of July you did what with those three cashier's checks?

A. Well, not on the 10th. On July 9th and 10th they were credited to the account of A. L. Kaye.

Q. What do you mean by credited them to the account of A. L. Kaye?

A. It went into his special account which we have set up for him.

Q. How long did they stay there, or did that amount of money stay there. That must have been the sum of one thousand forty-four dollars, fifty-one cents?

A. That's right, and it stayed there until July 21st when I withdrew a portion of those funds, which was nine hundred fifty-seven dollars, eighty-two cents leaving an unpaid [77] distribution on our part of eighty-six dollars, sixty-nine cents.

Q. Do you have any idea now why you withdrew only nine hundred fifty-seven dollars, eighty-two cents?

A. No, not offhand. Must have been a reason at the time.

The Court: Speak a little louder, please.

Mr. Bailey: Must have been a reason at the time.

Q. (By Mr. McNabb): Well, prior to that time you had been crediting to the indebtedness of Mr. Kaye and I assume in this instance you did that very thing. In fact, Exhibit "I" will indicate that on the 21st day of July you applied against that note the sum of nine hundred fifty-seven dollars, eighty-two cents, won't it?

A. That's right.

(Testimony of Ralph C. Bailey.)

Q. To your knowledge could it have been anything other than a mathematical miscalculation that caused you to leave this eighty-six sixty-nine out?

A. No, I would say not, because we set up this bank account to run the funds through the bank account so we could have a permanent record, and many times if it is set up for the sole purpose, for that sole purpose many times we take even figures for it is easier to run through the bank on an even figure basis than it is for an odd figure.

Q. Well, nine fifty-seven eighty-two isn't an even [78] figure?

A. No, but I mean as far as the not applying certain funds to the notes.

Q. Is it your testimony then that in this instance a special account was set up for Mr. Kaye through which you ran the payments of Josephine Boussard on escrow 691? A. That's correct.

Q. And it was set up for that purpose?

A. That I would, I cannot answer. I do not remember how it came about.

Q. Do you know when that account was set up?

A. July 9, 1952.

Q. What do your records indicate to have been the balance of that account on July 9, 1952?

A. Six hundred ninety-seven dollars, sixty-seven cents.

Q. Just the entirety of the May 10 and June 5 payments? A. Yes.

Q. Then you subsequently placed in that same

(Testimony of Ralph C. Bailey.)

account the payment which was made on July the 11th, or the 10th as your records will indicate?

A. That's right.

Q. Just for the purpose of clarifying the record, Mr. Bailey, this is, of course, the Defendant's Identification A which is the payment book on escrow 691. I will ask you to examine that and tell me if any payments were credited there during the month of July? [79]

A. July 11th, 1952 and I imagine this is what has happened as far as the permanent records of the bank is concerned, the girl did not change her date on the machine and she was posting the 10th's work on the 11th but she left the 10th in.

Q. We are talking then about the same payment and certainly the same amount of money?

A. That's right.

Q. How was the withdrawal made on the 21st day of July 1952 from this special account of Mr. Kaye's?

A. By a debit memo.

Q. By that you mean that the bank merely debited the account of Mr. Kaye?

A. That's right.

Q. He had nothing, no part, he played no part in the transaction at all?

A. No, only the, only according to the escrow instructions.

Q. When you say the escrow instructions now you are talking about this contract of purchase and sale which is Defendant's Identification B?

A. That's correct.

(Testimony of Ralph C. Bailey.)

Q. I believe that you brought that into court, did you not, Mr. Bailey? A. I did.

Q. Where has that been since the month of October of 1951?

A. It has been in our escrow file.

Q. Have you examined the signatures on that instrument?

A. I did not set it up. They appear to be all right.

Q. I mean, is that the signature of Mr. Kaye on that instrument? A. Yes.

Q. And of Mrs. Kaye?

A. Attorney in fact, A. L. Kaye.

Q. And of Josephine Boussard?

A. It is.

Mr. McNabb: I will move the admission of Defendant's Identification B, your Honor.

Mr. Johnson: We have no objection.

The Court: It may be admitted.

Clerk of Court: Defendant's Exhibit No. "2".

(Defendant's Identification B was received in evidence as Defendant's Exhibit No. "2".)

Q. (By Mr. McNabb): Do you have the records of the A. L. Kaye special account with you, Mr. Bailey? A. I do have.

Q. What was the balance of that account immediately following the debit memo as of the 21st day of July 1952 at which time you debited that account for nine hundred fifty-seven eighty-two?

A. Eighty-six sixty-nine. [81]

Q. That is the difference between what you

(Testimony of Ralph C. Bailey.)

received in the May, June and July payments and what you debited the account for?

A. That's right.

Q. You have no explanation at all for your failure to have taken the other eighty-six sixty-nine? A. I do not recall.

Q. You don't recall whether you have an explanation for it or—(Interrupted)

A. No, I don't recall why I didn't take it.

Q. You did take the money or place the debit memo to that account by reason of the escrow instructions in this contract of purchase and sale?

A. That's right.

Q. Why had there not been a special account set up prior to the 9th day of July, if you know?

A. I cannot answer that, either.

Q. You had, according to the escrow instructions of this contract you had taken and applied to the indebtedness all of the preceding moneys in the sum of twenty-one hundred seventy dollars or thereabouts without the use and benefit of a special account? A. That's correct.

Q. You don't know why you set up the account at all?

A. Only that I felt like it at that particular time. If I recall correctly we felt like we should have it of record [82] where it cleared through an account and direct disposition because if the payments had been applied directly to the note, the note was paid off and went into Kaye's hand, which he is entitled to hold, we would have no record of

(Testimony of Ralph C. Bailey.)

the disposition of funds through the escrow at all.

Q. But your records as mine are quite complete as to what occurred between the time you received the first payment on November 9 and when you set up the special. In fact, we didn't get confused at all until you did set up this special account and then we went off eighty-nine dollars, sixty-nine cents worth. Everything rolled along in a quite merry fashion up until that special account popped in here; is that not correct? A. No.

Q. What is incorrect about it?

A. This is the way we elected to do it.

Q. But the time had elapsed from about the 8th day of October when you first received the escrow and the 9th day of July, November, December, January, February, March, April, May, June, July, nine months? A. That's correct.

Q. Do you know now how much has been paid by Josephine Boussard on this contract of sale to that date?

A. According to my records eleven thousand one hundred thirty-two dollars, four cents.

The Court: Give me that again, please. [83]

Mr. Bailey: Eleven thousand one hundred thirty-two dollars, four cents.

Q. (By Mr. McNabb): How many payments at two hundred a month, Ralph?

A. I didn't count the number of payments, but I have a total here of sixty-six hundred.

Q. Did you credit that account with the payment on July 10th of 1954? A. No.

(Testimony of Ralph C. Bailey.)

Q. So it is sixty-eight hundred?

A. Well, yes, I beg your pardon. We did on July 10th. I did not credit the account, but I received the money.

Q. You received the money so there have been sixty-eight hundred dollars paid at the rate of two hundred a month toward the principal?

A. No, my records indicate sixty-six hundred.

Q. Well, now, I think you will find that there have been thirty-four such payments made. Will you check it?

Mr. Bailey: May I have a recess.

The Court: Yes, we will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon at 10:55 a.m., the court took a recess until 11:07 a.m., at which time it reconvened and the trial of this cause was resumed.)

RALPH C. BAILEY

the witness under examination at the time the recess was taken [84] resumed the stand for further

Cross Examination

The Court: Counsel ready to proceed with the trial?

Mr. Johnson: We are ready, your Honor.

Mr. McNabb: Defendant is ready, your Honor.

The Court: Very well.

Q. (By Mr. McNabb): So have you now ascer-

(Testimony of Ralph C. Bailey.)

tained how many two hundred dollar payments have been applied to this contract, Mr. Bailey, since it was placed in your bank?

A. Well, two hundred dollar payments, there is a total of sixty-eight hundred dollars.

Q. Thirty-four?

A. Thirty-four payments.

Q. And they have been made each month from the time that the payment, or that contract was placed in escrow in your bank?

A. That is correct. However, to rectify the records, the first two installments were doubled, four hundred each, which in reality would make thirty-two payments.

Q. There have been thirty-two payments?

A. Two transactions—(Interrupted)

Q. A total of sixty-eight hundred has been paid?

A. That is correct.

Q. And each payment has been made in accordance with the provisions of the contract of sale, your escrow 691? [85]

A. It has.

Q. And that contract provides for a payment to Mr. Kaye of fifty-seven dollars, fifty cents per month which is actually six per cent interest on eleven thousand five hundred?

A. That's right.

Q. And each of those payments have been made?

A. They have.

Q. Thirty-four of those? A. Yes.

Q. Likewise, the contract provides for eight per cent interest per annum on the portion of the con-

(Testimony of Ralph C. Bailey.)

tract which was evidenced by the four promissory notes which you presently have in evidence here, is that not correct?

Mr. Johnson: We object to that, if the court please, as not being a fair statement of the evidence. The contract does not include, or as counsel intimates the contract of purchase and sale is not based upon the four notes that are being foreclosed. They simply are referred to by reference as being the basis upon which two hundred dollars a month of the contract of purchase and sale was to go to the bank for a specific purpose.

The Court: Well, you can clear that up if it isn't clear when you get to cross examining the witness. Objection overruled.

Q. (By Mr. McNabb): Will you answer the question then, Ralph? [86]

A. I got carried away, would you please state—
(Interrupted)

Q. Let me withdraw that question and restate it. Each of the payments which were made provided for two hundred dollars which was to be applied directly toward the payment of principal. The contract also provided for the payment of interest at the rate of eight per cent per annum on a sum which was equal to the unpaid balance of the four promissory notes which were owed by Mr. Kaye and Mrs. Kaye to the Bank of Fairbanks; is that not correct?

A. That is a portion of it, yes.

Q. And so there was then paid two hundred

(Testimony of Ralph C. Bailey.)

dollars per month plus, at the very beginning of this contract eight per cent on fifteen thousand; is that not true?

A. Well, yes, that is a portion of it, but it is not all of it.

Q. What is the rest of it?

A. Well, the fifty-seven fifty and the two hundred and the interest. The fifty-seven fifty represents six per cent interest on the eleven thousand five hundred.

Q. That was Mr. Kaye's portion of the contract?

A. Well, yes and no. I mean the whole contract is Mr. Kaye's. It is not the Bank of Fairbanks.

Q. Now, you go ahead and tell your story. Each of us knows how it is.

A. You want me to tell it, how it is, how we understand [87] it, have interpreted it. The escrow was placed in the Bank. The amount of the escrow was originally twenty-six thousand five hundred.

Q. That was divided in what fashion?

A. It was divided fifteen thousand running at eight per cent.

The Court: How many thousand?

Mr. Bailey: Fifteen thousand carried eight per cent interest. Eleven thousand five hundred carried the rate of six per cent interest. It was a split escrow.

Q. (By Mr. McNabb): The fifteen thousand now, Ralph, that was what Mr. Kaye owed to the Bank of Fairbanks, wasn't it?

A. That has no bearing on the problem though.

(Testimony of Ralph C. Bailey.)

Q. That is true though, is it not?

A. That is what he owed us at that particular time.

Q. And that is where the money went, toward the reduction of the four notes in the amount of fifteen thousand?

A. What money are you speaking of?

Q. The money that you received, or the Bank received from Josephine Boussard?

A. All moneys received from Josephine Boussard went to liquidate this obligation supposedly.

Q. Well now, did it or didn't it?

A. Supposedly to this extent that part of it went in the bank account and I didn't get a chance to get ahold of it. [88]

Q. Whose fault was that?

A. Well, that was a clerical error in our banking institution.

Q. It wasn't your intention that it should get away, was it? A. No.

Q. Now, how much interest has Josephine Boussard paid on your fifteen thousand dollar notes?

A. Well, through July 10th only, not including the August 10th, and figuring I can add August 10th to it, I have twenty-seven hundred forty-nine dollars, fifty-four cents.

The Court: Give me that again, please.

Mr. Bailey: Twenty-seven hundred forty-nine dollars, fifty-four cents. If August payment was included in that it would be an additional seventy dollars thirty-three cents.

(Testimony of Ralph C. Bailey.)

Q. (By Mr. McNabb): Now, I am sorry to have to ask you to repeat, but I would like those figures, please. How much interest to the bank?

A. You mean Josephine Bousard has given us on this escrow?

Q. That's right.

A. Twenty-seven hundred forty-nine dollars, fifty-four cents, plus—(Interrupted)

Q. Seventy dollars, thirty-three cents?

A. Right. [89]

Q. Twenty-eight hundred nineteen dollars, eighty-seven cents. I believe you stated to me a moment ago that she had paid a total of eleven thousand one hundred thirty-one dollars, four cents as a total figure?

A. That includes the eight per cent interest, the two hundred a month and the six per cent interest on eleven five, yes.

Q. But that does not include the August payment, does it? A. No, it does not.

The Court: What was that. State that again.

Q. (By Mr. McNabb): It does not include the August payment. And the total amount of the August payment was what, Mr. Bailey?

A. Three hundred twenty-seven dollars, eighty-three cents.

Q. Or now then a total of eleven thousand four hundred fifty-nine dollars, eighty-seven cents?

A. I have eleven thousand four fifty-nine, eighty-seven.

Q. We are in accord for a change. How much

(Testimony of Ralph C. Bailey.)

interest has been paid at the rate of fifty-seven dollars fifty cents per month?

A. Including August payment I have eighteen hundred forty dollars.

Q. At fifty-seven fifty? A. That's right.

Q. How did you arrive at that figure?

A. I have taken it from the records of the bank.

Q. How much?

A. Well, my records show here, unless there is an error of some sort, eighteen hundred forty-dollars. My records still only show and that I can prove at this time eighteen hundred forty dollars. If there is a discrepancy why I will have to have time.

Q. Well, Mr. Bailey, let me ask you this now, you have examined the receipt book?

A. Not thoroughly, no.

Q. We are going to, we are going to have to get this matter determined. There have been thirty-four payments of fifty-seven dollars fifty cents made. That is, there have been thirty-four payments made on this escrow, have there not?

A. Well, actually, thirty-two, but they doubled up there at the beginning and that is where I am confused and my take-off could be wrong.

Q. During the lunch hour will you ascertain whether or not that has been done, that is, whether there has not been a total of nineteen hundred fifty-five dollars paid as interest on Mr. Kaye's eleven thousand five hundred, that is thirty-four payments of fifty-seven dollars fifty cents each?

(Testimony of Ralph C. Bailey.)

A. Right.

Q. Now, assuming Mr. Bailey that there has in fact been thirty-four payments of fifty-seven dollars, fifty cents each, thirty-four payments of two hundred each, and thirty-four [91] payments toward the interest on the four notes of the bank, there has been then paid a total of eleven thousand five hundred seventy-four dollars, eighty-seven cents. Is that or is it not a correct statement?

A. The records that I had to work with, I don't come to that figure.

Q. You show eleven thousand four hundred fifty-nine dollars, eighty-seven cents?

A. Yes.

Q. The sum of one hundred fifteen dollars differential there which actually amounts to two interest payments at fifty-seven dollars, fifty cents?

A. That's right.

Q. Mr. Bailey, what has the bank done with the fifty-seven dollars, fifty cents monthly interest payable to Mr. Kaye?

A. I cannot answer that question at this moment.

Q. We started with fifteen thousand dollars indebtedness on the part of Mr. Kaye to the bank. The bank has now received a total of sixty-eight hundred as principal. If that amount only had been applied toward the retirement of the four notes there should not now be an unpaid balance in excess of eighty-two hundred; is that not correct, sir?

(Testimony of Ralph C. Bailey.)

A. If all of it had applied on the notes that is correct.

Q. According to the escrow instructions you were directed to apply those proceeds, were you not? [92]

A. Yes, either directly or indirectly.

Q. And in fact from the date of the contract up to and including the 21st day of July of 1952, a period of ten months, you had done precisely that very thing, had you not?

A. Yes, directly.

Q. No, now, not directly because on the 9th day of July you set up the special account?

A. That's right, up until that time.

Q. But everything prior to the 9th day of July had gone directly? A. That's correct.

Q. That is true. Now, what has become with the rest of the money; the notes presently show an unpaid balance of approximately eleven thousand dollars if I am not mistaken?

A. That's correct.

Q. Where did the money go?

A. In Mr. Kaye's special account which I did not have any jurisdiction over. I took out what I got and that was it.

Q. I have no record aside from the records on the reverse side of the four notes which I take it, now, on the 21st of July of 1952 you applied the sum of eight hundred eighty-eight dollars, nine cents as, by way of principal toward the reduction

(Testimony of Ralph C. Bailey.)

of the balance of your, that is Plaintiff's Identification "I".

The Court: Now wait just a minute. What is that amount? [93]

Mr. McNabb: Eight hundred eighty-eight dollars, nine cents.

Mr. Bailey: And the sum of sixty-nine dollars seventy-three cents toward interest which paid the interest on your Exhibit "I" to date, that is, to 7-21-52; that correct?

Mr. McNabb: Correct.

The Court: Now, let's see, this suit started on the 23rd of April, '52?

Mr. McNabb: Correct.

The Court: Now you are down into July, July 21; is that right?

Mr. McNabb: Yes, your Honor.

The Court: The point we are interested in is it was all paid up to the time they commenced the suit?

Mr. McNabb: No, sir, it is not, your Honor.

The Court: How come?

Mr. McNabb: Because these people have accepted these payments each day, each month in an amount in excess of eleven thousand dollars and I am interested in ascertaining what became of the money clear up to and including the 10th day of August, 1954, sir.

Q. (By Mr. McNabb): Now, there was nothing applied on this particular note from July until

(Testimony of Ralph C. Bailey.)

December; is that not correct, and by this particular note I mean Exhibit "I"?

A. Correct. [94]

Q. And nothing on Exhibit "G" from the 13th of October, '51 until the 11th day of, the 12th day of November, '53? A. That's right.

Q. And on Exhibit "E" there is a gap from October 13, '51 until the 11th day or the 12th day of November, '53? A. That's right.

Q. And the same thing is true of Exhibit "C"?

A. That's correct.

Q. And in each of these months you had received the sum of two hundred a month plus eight per cent on nearly fifteen plus fifty-seven dollars, fifty cents? A. That's correct.

Q. Now, where did that money go?

A. In Mr. Kaye's special account.

Q. Now, do you have the balance of that account, and that was in contravention of the escrow instructions, was it not? A. No.

Q. You were to apply the payments as you received them toward the reduction of these four notes, were you not? A. That is correct.

Q. And you did not do that then?

A. Not directly.

Q. Why did you not do that?

A. We had the funds in Kaye's special account.

We could draw on that account as we saw fit. [95]

Q. But did not the escrow instructions direct you to apply those payments? A. Yes.

Q. Well, why did you not do it?

(Testimony of Ralph C. Bailey.)

A. That I cannot answer.

Q. So the interest continued to run on these things all of that period, sometimes months elapsed between the times that you applied the payments?

A. Yes.

Q. Though the money was there and you had been directed to apply it to the payment of these notes? A. That's correct.

Q. Mr. Bailey, I would like to know why from the 9th day of November of 1951, at which time you received a total of six hundred forty dollars, applied it immediately toward these notes; December 10, 1951 you received five hundred thirty dollars and applied it immediately to the notes; March 10th you received three hundred fifty-two dollars and applied it immediately to the notes; April the 8th, 1952 you received three hundred fifty dollars and applied it immediately to the notes; then subsequently you received three payments in May, June and July and applied those payments to the notes and then you allowed months to elapse before you applied any more, though the payments were made. Why did you do that, sir?

A. That I cannot answer. I don't know. I don't remember. I must have had a good reason at the time. [96]

Q. You knew of course that the, you testified yesterday that you knew on the day that this contract was placed in escrow, 691?

A. That's right. The only reason that I could give off-hand is that in view that we were in liti-

(Testimony of Ralph C. Bailey.)

gation that we elected not to take them from this account. That I cannot remember.

Q. Let me say this, Mr. Bailey, on the 9th day of November Mr. Kaye was in default to you on four notes, wasn't he? A. That's right.

Q. On the 9th day of November '51 he was fifteen thousand dollars in debt to you and some of those notes having run since the 8th day of May, 1945, your Exhibit "C"? A. That's right.

Q. Six years old and in default. Now then, five months, November, December, February, March and April you took the money and applied it immediately, a sum of twenty-one hundred seventy dollars worth of funds went directly to the payment of this money without any special account, without any hesitancy on your part or anything of the kind? A. That's right.

Q. Then after you received the money on the 8th day of April you decided to file suit and to foreclose the mortgages which secured these four notes, did you not? A. That's right.

Q. So on the 21st day of April 1952 you filed a [97] mortgage foreclosure action?

A. That's right.

Q. And on the 21st day of July after having held one thousand forty-four dollars fifty-one cents, bam, you immediately applied that to the notes, too, didn't you? A. That's correct.

Q. Now, I am quite interested in ascertaining, Josephine Boussard has paid to the bank on escrow 691 a total of eleven thousand five hundred seventy-

(Testimony of Ralph C. Bailey.)

four dollars and eighty-seven cents, and the bank was directed to use every bit of that money to discharging the four notes which this suit concerns, that is, Plaintiff's Exhibits "G", "E", "C", and "I". I would like to know what became of that money? You were directed to use it toward the liquidation of that indebtedness and it has been in your funds and the escrow instructions provide that you are to take it and for ten months you did precisely as you were directed, and applied it immediately and directly to the payment of these debts. Now, what have you done with the money?

A. I put it in Mr. Kaye's special account. It was his funds, not mine.

Q. Contrary to what you were directed to do then?

A. Well, if I recall correctly, there was some conversation in there that you have not brought out, or are not aware of. If I recall correctly, but that I can't swear to.

Q. But the point is even after you instituted this lawsuit on the 21st day of April '52 you applied three payments [98] and you did that on the 21st day of July? A. That's right.

Q. Did you not? A. That's right.

Q. Without any further instructions or anything of the kind? A. That's right.

Q. Can you provide us with the information as to what has happened to this money. There is a differential?

(Testimony of Ralph C. Bailey.)

A. No, because I didn't spend it all. I put it in an account.

Q. In putting it in an account was contrary to the escrow instructions? A. No.

Q. Supposed to be paid to the liquidation of this debt, was it not?

A. Yes, but this is the means that I took to do it.

Q. But you cannot tell the court why it took you from early in October of '51 to the 9th day of July '52 to decide upon this particular course of conduct, can you? A. No.

Q. And there was no difficulty with finding a place to put the money prior to the time you elected to use a special account, was it?

A. There was no difficulty, no.

Q. And you didn't set up the special account until the [99] 9th of July '52, which was three months after you instituted this very lawsuit, was it not? A. That's right.

Q. And all the times prior to that you had applied the money forthwith immediately and in its entirety? A. That's right.

Q. Now, we have a, you are not able to tel' us where the money went then that Josephine Boussard paid in on this contract?

A. Yes, it went to Mr. Kaye's special account and I didn't spend the money out of it. It was not there when I elected to go after it.

Q. On what dates did you elect to go after it?

A. Oh, at various different intervals during the course of this time.

(Testimony of Ralph C. Bailey.)

Q. When?

A. According to these notes there are several different dates and according to the ledger sheets here.

Q. Does the escrow instructions call for setting up of a special account in this thing?

A. It does not. It is the bank's prerogative to do so.

Q. Is it the bank's prerogative also to disregard what it says in escrow instructions?

A. Not if it is used in the right manner, which we feel that this was.

Q. You did then disregard the instructions?

A. No. [100]

Q. What? A. No.

Q. When did you not disregard the instructions?

A. Even by placing to the special account where the funds should have been held at all times and should have been made available to us. We should have been able to go to that account and apply it against the notes at our will.

Q. So that you could have held the entirety of this eleven thousand dollars in a special account, and for all practical purposes we are agreed now that there has been a total of eleven thousand five hundred seventy-four dollars, eighty-seven cents paid, are we not?

A. Well, no, we haven't substantiated that figure yet.

(Testimony of Ralph C. Bailey.)

Q. There is a difference of one hundred fifty dollars, two interest payments?

A. That's correct.

Q. We are then in accord that there has been eleven thousand four hundred fifty-nine dollars, eighty-seven cents paid, are we not?

A. That's right.

Q. And it is your testimony now then that you could have taken that money and in contravention of what it says in any escrow instructions, and have placed that in a special account; is that right?

A. Yes, that is our prerogative.

Q. And let the interest run on the fifteen thousand [101] dollars worth of notes?

A. You got me.

Q. Yeah, that is what I thought. Now, that doesn't add up at all, does it?

A. No, I think you are perfectly right in that particular phase of it, sure.

Q. You don't have any explanation for this special account business, do you, Ralph?

A. The only one that I have is what I told you, George. That we felt like we wanted to keep track of these funds and we wanted to hold them and place them to the notes all at one time. We were in litigation, if you recall, at that particular time, and our mood just exactly was not known and in checking with our attorney it was suggested that we do so.

Q. But even after you set up this special account, Ralph, and had in it those three payments of

(Testimony of Ralph C. Bailey.)

May, June and July, you forthwith applied them on the 21st of July, didn't you?

A. That's right.

Q. And that was after this lawsuit had been started for three months?

A. Well, no. See we had held, actually the account was started July 9th, and we had held the May, June and July payment came in and we started the account at that particular time, after we had filed out suit.

Q. Yeah, three months after you started the suit? [102]

A. That's right.

Q. And you had held on July 9th you had very near seven hundred, and on the 21st of July when you applied it you had a thousand forty-four dollars, and the interest had been running on these four notes all the time and Josephine Boussard, who had assumed this obligation, was charged with the interest when she could have saved herself interest on the three hundred in May, three hundred in June, and you say there and held it, didn't you?

A. No, she was not charged.

Q. Who was not charged?

A. Kaye, Kaye would have been charged against his obligation. Josephine Boussard does not enter into this picture at all as far as what you are telling me now.

Q. The interest continued to run on Kaye's debt, did it not?

A. You mean to the Bank of Fairbanks?

Q. Yes, sir?

A. Yes, that's right.

(Testimony of Ralph C. Bailey.)

Q. And the money was there with which to pay it? A. That's true. Agreed.

Q. And you didn't apply it? A. No.

Q. And the interest continued to run?

A. That's right.

Q. Why didn't you apply it? You don't know.

A. I don't know.

Q. And you don't know what has become of eleven thousand dollars? A. Yes, I do.

Q. What is the total indebtedness of Kaye to the bank today?

A. Something like eleven thousand dollars.

Q. And it started at fifteen?

A. That's right.

Q. And there has been eleven thousand and five hundred seventy-four dollars paid?

A. Something like that.

Q. And sixty-eight hundred on the principal of this thing? A. That's correct.

Q. Twenty-eight hundred nineteen dollars toward interest to the bank?

A. That's right.

Q. And we have succeeded in reducing the debt of Mr. Kaye by the fantastic figure of about four thousand dollars? A. That's correct.

Q. And you had the money with which to pay it right there, wasn't it?

A. Not in its entirety, no.

Q. How far off would we be?

A. Possibly if we had taken every penny that would have [104] come in to the bank we would

(Testimony of Ralph C. Bailey.)

have been down considerable as we all know at this time.

Q. And you had the authority to take it, did you not? A. Yes.

Q. And you didn't do it? A. No.

Mr. McNabb: That's all.

Redirect Examination

Q. (By Mr. Johnson): Mr. Bailey, in Mr. Kaye's answer which has been filed in this case, Mr. and Mrs. Kaye, that is, they allege that at the time of this contract of purchase and sale was placed in escrow that it was agreed between you and them that the notes and mortgages referred to could be extended and that the plaintiff would accept the monthly payments of two hundred per month together with interest due thereon as payments upon the mortgages and that no further payments would be required. Now, will you tell the court what about that, if anything?

A. You want it in detail?

Mr. McNabb: Well, now, just a minute. I am going to object to it as leading and suggestive. This is Mr. Johnson's witness. This is still the plaintiff's case. Calls for a conclusion. There is no proper foundation laid for it.

The Court: Objection overruled.

Q. (By Mr. Johnson): Will you tell the court whether or not you had any [105] conversation with Mr. or Mrs. Kaye about that proposition?

A. Not at that particular time, no.

(Testimony of Ralph C. Bailey.)

Q. Did you ever have any conversation with them about it, either of them?

A. Well, I don't recall whether I had one directly or not, but indirectly through another person, a third party I did have, yes.

Q. Well, who was that?

Mr. McNabb: Now, I am going to object to that as calling for hearsay testimony.

The Court: All right. Objection sustained.

Q. (By Mr. Johnson): You never had any conversation then directly with Mr. or Mrs. Kaye concerning any agreement as alleged in their answer?

A. Not to my recollection.

Q. Do you know whether or not—(Interrupted)

A. Not at that time. Now we are speaking at that time. I did later.

Q. Well, when was that?

A. I can't remember, several months afterwards.

Q. And who was the conversation held with, both of them or just one?

A. No, just Mr. Kaye.

Q. And where did you talk to him?

A. In the Bank of Fairbanks directors' room.

Q. And will you tell the court what was said?

Mr. McNabb: Now just a moment. I am going to object until you lay a proper foundation.

Q. (By Mr. Johnson): Was there anything said on this alleged agreement on the part of the bank to waive its right to foreclose its mortgages

(Testimony of Ralph C. Bailey.)

at that conversation you say you had with Mr. Kaye?

Mr. McNabb: I am going to object to that question, your Honor, on the grounds that no proper foundation has been laid concerning any conversations between Mr. Bailey and Mr. Kaye.

The Court: Is that pleaded; such an agreement pleaded?

Mr. Johnson: Yes, your Honor, I am reading from Page Two of the Answer of Kaye.

The Court: Which paragraph would that be in?

Mr. Johnson: Paragraph Two of Page Two of my copy.

The Court: This is the answer of defendant's A. L. Kaye and Jean Kaye?

Mr. Johnson: Yes, that is the one I am reading from, and the paragraph *beings*, your Honor, with the words, "that said contract of sale and said escrow instructions were entered into with the full knowledge and consent of the plaintiff" and so on. A little further down, in, let's see, in the fifth line of the paragraph after the words "Josephine Bousard" it reads, "and it was also agreed by and between the [107] plaintiff and the defendants that said notes and mortgages referred to in the four causes of action contained in said plaintiff's complaint would be extended and that the said plaintiff would accept the monthly payments", you see what I mean, of two hundred per month together with the interest thereon as payments upon the mortgages, and that no further payments would

(Testimony of Ralph C. Bailey.)

be required to be made by the said defendants or any of them. Now, it is in relation to that alleged agreement that I am questioning the witness and asking him to tell what, if any, conversations he had with Mr. Kaye about it. He says he had none at the time the agreement was placed in escrow but that subsequently he talked about this matter with Mr. Kaye in the directors' room of the Bank of Fairbanks. At that point counsel interposed his objection.

The Court: Well, as long as you are within the matter pleaded I don't see why it isn't admissible.

Mr. McNabb: Well, Judge, I am not objecting to the admissibility of the testimony at this time, but I am objecting to it on the grounds that he hasn't laid a proper foundation for the question that he asked this man, and I would like to have a proper foundation laid for it to know where and when the conversation took place and who was present and all of the other things that normally and naturally constitute a proper foundation.

Mr. Johnson: The witness testified, your Honor, that he could not recall when it took place, it was several months [108] afterward. He did say it took place in the directors' room of the Bank of Fairbanks, and at that point counsel interposed the objection. I had not yet had an opportunity to ask the witness who was present. I intended to do so.

Mr. McNabb: Proceed.

The Court: Well, with that understanding we will overrule the objection.

(Testimony of Ralph C. Bailey.)

Q. (By Mr. Johnson): Who was present when you had this conversation with Mr. Kaye aside from Mr. Kaye and yourself, if anyone?

A. I think we were alone for a little bit, and then I think Mr. Johnson then president of the bank, appeared on the scene. If I recall correctly. If there were any others around I do not recall.

Q. Do you recall what Mr. Kaye said about this matter as alleged in his answer, and what you said?

Mr. McNabb: Now just a minute. Go ahead.

Q. (By Mr. Johnson): Do you recall what, if anything, was said about the matters set forth in paragraph Two of Mr. Kaye's answer concerning an alleged agreement to extend this mortgage?

Mr. McNabb: Your Honor, I am going to object now on the grounds that no proper foundation is laid for it, and by that I mean I think that we should make some further effort to ascertain the approximate date of this conversation. He said several months later. The witness may be able to establish [109] by one method or another the approximate date, certainly at least the month in which this conversation took place.

The Court: Objection overruled.

Q. (By Mr. Johnson): Go ahead now. Will you tell what Mr. Kaye said, as nearly as you can remember, and what you said?

A. Well, these are not the exact words because I can't recall what was said either by Mr. Kaye or myself, but the gist of the conversation was that we had called in Mr. Kaye to let him know that

(Testimony of Ralph C. Bailey.)

we were not satisfied with the liquidation of this loan we speak of in the amount of funds being received on the escrow. At that time it was Mr. Kaye's firm conviction that we had given a verbal commitment to the realtor of this third person we speak of that, who in turn had told Mr. Kaye that we would liquidate the mortgage in a satisfactory manner from the proceeds of this escrow. That was not the case at all and it was a misunderstanding, and at that time is when we told Mr. Kaye that we wanted to liquidate the mortgage loan as soon or sooner than he had elected to do so by giving us this escrow.

Q. At the time that you received this escrow, did you enter into any agreement with Mr. Kaye and Mrs. Kaye, or with Miss Boussard?

A. I did not.

Q. Concerning the change in the method of liquidation of your notes and mortgages? [110]

A. I did not.

Q. Did the Bank of Fairbanks?

A. They did not.

The Court: It is just twelve o'clock, Mr. Johnson. This is a good place to stop for recess. Do you, do we have anything on?

Clerk of Court: No, we do not, your Honor.

The Court: We will recess until two o'clock.

Clerk of Court: Court is recessed until two o'clock.

(Thereupon, at 12:00 noon a recess was taken until 2:00 p.m.)

Afternoon Session

(The trial of this cause was resumed at 2:00 p.m., pursuant to the noon recess.)

The Court: Counsel ready to proceed with the trial of Bank of Fairbanks vs. Kaye?

Mr. Johnson: Plaintiff is ready, your Honor.

Mr. McNabb: Defendant is ready, your Honor.

The Court: Very well.

RALPH C. BAILEY

the witness on the stand at the time the recess was taken, resumed the stand for further redirect examination.

The Court: You are cross examining this witness, are you not?

Mr. Johnson: No, I was examining him further on redirect, your Honor. [111]

Q. (By Mr. Johnson): Mr. Bailey, the agreement which has been admitted in evidence as Defendant's Exhibit "2" which is the contract of purchase and sale between A. L. Kaye and Jean Kaye as sellers and Josephine Boussard as the buyer, did you or any one for the bank have anything to do with the preparation of this agreement?

A. No.

Mr. McNabb: Now, just a minute. I am going to object to that as being too vague and having no bearing on the issues of this case.

The Court: Objection overruled.

Q. (By Mr. Johnson): Did the Bank of Fairbanks take part in any discussions between Jose-

(Testimony of Ralph C. Bailey.)

phine Boussard and the Kaye's that led up to this agreement.

Mr. McNabb: Just a minute. I am going to object, no proper foundation having been laid for it, and calls for something beyond the knowledge of this defendant, or this witness.

The Court: Objection overruled.

Q. (By Mr. Johnson): So far as you know, do you know whether or not—(Interrupted)

A. No, we had nothing to do with it to my knowledge.

Mr. McNabb: I move that that answer be stricken [112] on the grounds that it was not responsive to the question.

The Court: Motion denied.

Q. (By Mr. Johnson): After the agreement was executed it was brought to you together with a letter of instructions, or the escrow instructions, is that correct, and deposited in your bank?

A. That's correct.

Q. In the usual course of your business?

A. It was.

Q. You have many such escrows in your institution, do you not? A. We do.

Q. Now, referring to the answer filed by Josephine Boussard and specifically to Paragraph Five of the first affirmative defense which appears—(Interrupted)

Mr. McNabb: May the court please, I would like to call to Mr. Johnson's, to the court's attention that we are still in the plaintiff's case and that this

(Testimony of Ralph C. Bailey.)

witness is the plaintiff's witness, this being redirect examination, and I am going to object to him asking leading and suggestive questions.

The Court: Very well.

Mr. Johnson: Well, if the court please, I hadn't even finished the question, and certainly counsel in his cross examination brought up all that there was to bring up about the Boussard, Kaye contract. It would seem to me that Boussard being a defendant in this case, I have the right to ask the [113] witness a specific question concerning the answers.

The Court: You are attorney for the plaintiff, aren't you?

Mr. Johnson: That is correct, sir.

The Court: You called him as your witness?

Mr. Johnson: Yes.

The Court: Then you can't ask him leading questions unless special permission is granted.

Mr. Johnson: I was simply by way of preliminary reference, your Honor, leading up to a question I wanted to ask him specifically and I was trying to do it by reference in a paragraph filed in the answer by the defendant Josephine Boussard. I hadn't even gotten any farther than that. I hadn't even asked the question.

The Court: I take it all Mr. McNabb is telling you, he was just telling you what he was going to do and he has objected. That is how the question arose.

Mr. Johnson: May I proceed and if I am wrong the objection may—

(Testimony of Ralph C. Bailey.)

The Court: Yes.

Mr. Johnson: Will the court refer to the answer of Josephine Boussard which was filed in this case, and on Page, Pages 2 and 3, Paragraph five of the first affirmative defense, I should like to ask this witness a question with reference to an allegation made in that paragraph.

The Court: Did you want to show him the original pleading? [114]

Mr. Johnson: No, I can just read it. I thought the court might want to follow it.

Mr. McNabb: That is precisely what I am objecting to, your Honor, reading the pleadings to this witness, saying is that true or is that false. That is a leading question, Judge.

The Court: Under these conditions I will regard that as admissible.

Mr. McNabb: Very well, sir.

Q. (By Mr. Johnson): Now, in paragraph five, which appears on Pages 2 and 3 of Josephine Boussard's answer she alleges that the plaintiff made representations to her and to her agent that the plaintiff would accept payments to discharge mortgages set out in the plaintiff's complaint according to the terms and the manner as set out in Exhibit "1". Now, Exhibit "L" in this answer is the contract which you have before you there and that she proceeded in good faith to sign said contract and thereafter made the payments to the plaintiff as aforementioned. Did you ever have a conversation with Josephine Boussard prior to the

(Testimony of Ralph C. Bailey.)

signing of this agreement relative to that allegation or anything like it? A. No.

Mr. McNabb: For the purpose of record, I am going to object to the question as being leading and suggestive and not proper recross examination, or redirect examination. [115]

The Court: Objection overruled.

Q. (By Mr. Johnson): What was your answer?

A. No.

Q. After the agreement which you have before you which is the contract of purchase and sale, after that agreement was executed and placed in escrow, were you or were your bank, did you have any conversations with Josephine Boussard or any agent of hers relative to this matter?

Mr. McNabb: Same objection, your Honor.

The Court: Overruled.

Mr. Bailey: No. If you are asking me if, that I agreed or talked to Josephine in regards to accepting this contract for the liquidation of the notes, mortgage notes alone, I did not agree to the terms and the conditions.

Q. (By Mr. Johnson): Now, Mr. McNabb has questioned you considerably about the payments made on the Boussard contract as being, and which payments have been applied or some of them at least have been applied on Kaye's indebtedness. Mr. McNabb has kept insisting that this money was Miss Boussard's money.

Mr. McNabb: Now, I object to counsel testify-

(Testimony of Ralph C. Bailey.)

ing as to what I have been insisting on. I haven't even been a witness here.

Mr. Johnson: Well, I think that is a fair interpretation of this line of questioning. [116]

The Court: Finish your question and I will rule on it.

Q. (By Mr. Johnson): Isn't it a fact that all of the money that Miss Boussard paid on her contract which you have there before you actually belonged to Mr. Kaye under the terms of the contract?

Mr. McNabb: I object to that as calling for a conclusion, not within the issues of this case, improper redirect examination, no proper foundation has been laid for it.

The Court: Objection sustained.

Q. (By Mr. Johnson): In addition to the payments which were provided in this contract to be made or turned over to the bank after October 9, 1951, and up until the time that the bank started its foreclosure proceeding in April, did Mr. Kaye make any further payments on the notes and indebtedness which he owed to the bank as provided by those notes?

A. Over and above this contract?

Q. Yes. A. No.

Q. Did the Bank of Fairbanks either before or after October 9, 1951 ever enter into any written agreement with Mr. and Mrs. Kaye or Mrs. Boussard wherein it agreed to change the terms of payment of the indebtedness that was due the bank by

(Testimony of Ralph C. Bailey.)

Mr. and Mrs. Kaye? A. No. [117]

Q. This special account that you speak of which you term as a special account, do you have the ledger sheet of that account? A. I do.

Q. Does that show all of the deposits and withdrawals made to the account? A. Yes.

Q. From the time that it was set up?

A. Yes.

Q. Did Mr. Kaye have the right to draw on that account? A. Yes.

Q. Did he from time to time make withdrawals on the account? A. Yes.

Q. After you started your foreclosure suit, did you have occasion to add to the indebtedness due by Mr. Kaye?

Mr. McNabb: Now, I object to that.

Q. (By Mr. Johnson): By way of attorneys fees and court costs?

Mr. McNabb: I object to that as having no bearing on the issues of this case, your Honor.

The Court: Objection sustained.

Q. (By Mr. Johnson): This morning you testified, I believe, in answer to Mr. McNabb's question that so far as you were able to determine there had been paid in on the Boussard account or the Boussard [118] escrow up to and including August 10, 1954, the sum of eleven thousand four hundred fifty-nine dollars, eighty-seven cents; is that correct? A. That's correct.

Q. And of that amount how much was credited to or applied on the Kaye indebtedness?

(Testimony of Ralph C. Bailey.)

A. Principal and interest in the amount of six thousand nine hundred eighty-two dollars, eight cents.

Q. The balance of that sum of money went where, if you know?

A. Bank account four thousand one hundred twenty-four dollars, seventy-one cents. Five dollars for service charges, and this August 10th payment was applied to the notes which would increase my original amount of sixty-nine hundred by three hundred twenty-seven dollars, eighty-three cents.

Mr. McNabb: How much then has been applied on the note?

Mr. Bailey: Six thousand nine hundred eighty-two dollars, eight cents, plus three hundred twenty-seven dollars, eighty-three cents.

Q. (By Mr. Johnson): Do you have those figures written down so that they could be presented to the court?

A. They are, well, they are on adding machine tape.

Clerk of Court: Plaintiff's Identification No. 10.

(Adding Machine Tape Memo was marked Plaintiff's Identification No. 10.)

Q. (By Mr. Johnson): I will show you Plaintiff's Identification No. 10, ask you if that is a memorandum made up by you? A. It is.

Q. Does it show the total amount of principal and interest paid or credited to the notes?

A. No, not this particular slip does not.

(Testimony of Ralph C. Bailey.)

Q. Does it show the amount that was paid or credited to the bank account?

A. It does. It shows the deposits.

Q. Well, isn't there a pencil figure below that which shows the principal and interest paid on the notes?

A. Yes, six thousand nine hundred eighty-two dollars, eight cents, plus three hundred twenty-seven dollars, eighty-three cents.

Q. Does it show this five dollar deduction for the escrow charges? A. It does.

Q. And does it show the August 10th payment?

A. It does.

Q. So that it does show the total of principal and interest paid in on the Boussard account?

A. Yes.

Q. And the distribution of the money? [120]

A. Yes.

Q. Is it true and correct so far as you know?

A. Correct as far as I know.

Mr. Johnson: We would like to offer Plaintiff's Identification No. 10.

Mr. McNabb: I am going to object to it. It doesn't show anything except a tape full of figures, your Honor. Nothing designated on this identification.

The Court: I am going to sustain that objection, Mr. Johnson, because it doesn't designate what it stands for. It could be made plainer, more lasting than it is. This depends upon the memory as

(Testimony of Ralph C. Bailey.)

to which column means which, without any designation in writing.

Q. (By Mr. Johnson): Do you have a memorandum that you have made up which segregates the payments, shows how they were credited and to whom and for what?

A. I have work sheets which is a break down of the receipts and a break down of the disbursements.

Q. Was that made up by you? A. It was.

Q. Is it in your handwriting? A. It is.

Q. Would that contain the information that was on this adding machine tape that we just mentioned?

A. It would as far as the receipts is concerned. I [121] believe I would have to add to the disbursements to complete it.

Q. That is because of some additional changes?

A. That's right, August 10 payment.

Q. Could you make those additions and then we could submit it after while? A. I could.

The Court: Do you have a pad there of some sort?

Mr. Bailey: Yes, I have. I have my work sheets, your Honor.

The Court: Well, I would like to get a condensed matter to look at so it wouldn't take so much time.

Mr. Bailey: I have too many figures, and I am possibly the only one that could read it.

Mr. Johnson: We will prepare such a condensed statement, your Honor.

(Testimony of Ralph C. Bailey.)

The Court: Don't get too much on it. Just the essentials.

Mr. Johnson: Just the essentials, yes.

The Court: Write what it stands for.

Mr. Johnson: Well, subject to the right, your Honor, to submit this condensed statement, I have no further questions.

The Court: Very well.

Recross Examination

Q. (By Mr. McNabb): Mr. Bailey, do you know in which two months Josephine [122] Boussard did not pay interest to Mr. Kaye in the amount of fifty-seven dollars, fifty cents a month?

A. Time did not permit me to break that down, but I am sure, fairly sure that I am correct. I know where it is but I would hesitate to answer your question until I verified it down to my satisfaction.

Q. Let me ask you then, did she ever fail during the course of this contract to pay fifty-seven dollars, fifty cents, to the best of your knowledge?

A. To get to that answer it is evidenced by my records. The person or persons accepting the first two payments on this escrow somewhere along the line failed to prepare the fifty-seven dollar, fifty cent entry in the proper places. I think it has been entered, but it has been entered in the improper column. It shows interest income to the Bank of Fairbanks, and it is my belief at this time without checking it out further that possibly one hundred

(Testimony of Ralph C. Bailey.)

fifteen dollars should have been credited to Kaye on his portion as interest on the eleven thousand five hundred.

Q. You mean that was way back along early in the first couple of payments?

A. That is correct.

Q. And you got the entirety of those first payments? A. That is correct.

Q. But you believe now Josephine Boussard in each of these thirty-four payments did in fact pay fifty-seven dollars [123] fifty cents?

A. No, that is not correct. In fact according to these records here and checking it this noon it is evident here her interest to Kaye didn't start until December 9, and that from the time the contract of sale was signed until December 9th, fifty-seven dollars, fifty cents in both instances Kaye did not receive. However, it is my feeling at this time that person or persons receiving the payments on the Bank of Fairbanks as you call the portion of this deal, fifteen thousand dollars, there was too much interest taken and there is a differential in there so the fifty-seven dollars fifty cents could be in what we collected presumably to be in our portion, on the one portion of the obligations.

Q. Now then, there is no dispute at all among any of the parties, is there, that there was no special account into which in which the payments of Josephine Boussard were deposited prior to the 9th day of July, 1952?

A. There could be. I would want to go back and

(Testimony of Ralph C. Bailey.)

check my records further back, myself individually I have had some one else do it this far.

Q. Well, now, you testified yesterday and again today that on the 9th of July you established a special account?

A. That's right. He could have had a special account before that.

Q. Well, how many special accounts did he have then?

A. Well, how do I know without checking?

Q. What special account were you talking about all of this time?

A. The one established on July 9th.

Q. How many special accounts did Mr. Kaye have on the 10th of July then?

A. One to our knowledge.

Q. How many did he have on the 8th of July?

A. One to our knowledge at this time.

Q. When did he establish the one that he had on the 8th of July?

A. I beg your pardon. I misunderstood.

Q. So far as you know he had no special account at all on the 8th of July?

A. Not to my knowledge.

Q. All right. Let me ask you again, what was done with the money that was taken in by the bank on the first of November 1951 until you established the special account on the 9th day of July '52?

A. The proceeds either went on the note or when we opened up the special account they went in there.

(Testimony of Ralph C. Bailey.)

Q. So there was no special account in which they were deposited? A. No.

Q. You applied those payments directly, did you not? A. Yes.

Q. So there wasn't any special account in which you [125] deposited them at all prior to the 9th of July?

A. No, not for this particular purpose. As I say, he could have had another one in his own name and used it for other things.

Q. You told me this morning though, did you not, that you established this special account for the purpose of keeping an accurate account of the transactions as they occurred?

A. That's right.

Q. You did that on the 9th?

A. That's right.

Q. Which leads us in turn to believe that there was no special account into which they were deposited prior to that time?

A. That's correct.

Q. So you in effect took the money and immediately applied it, did you not?

A. Up until July 9th, or up until the payments received in May.

Q. And that amounted to two thousand one hundred seventy dollars, eighty-four cents, actually it is two thousand one hundred seventy-seven dollars, eighty-four cents?

A. Well, that, you have it broken down and I haven't broken it down.

(Testimony of Ralph C. Bailey.)

Q. Well, yesterday you testified that it was approximately two thousand one hundred seventy dollars? A. That would be right. [126]

Q. And so that was applied forthwith?

A. Yes.

Q. Now at whose request was this, or how did, what conversations or what transactions led up to the establishment of this special account on the 9th of July? A. I don't remember.

Q. Well, did you consult with Mr. Kaye about it?

A. I have a feeling that we talked about it, but I cannot, I can't say yes and I can't say no, because I don't recall.

Q. Did you ever deliver to Mr. Kaye any memorandums or any notations or anything of the kind on the 9th day of November of 1951 or the 10th day of December, 1951, or February 11, '52, or the 10th or 12th of March, '52, indicating to him that you had applied the proceeds of the payments to the liquidation of his indebtedness?

A. Myself personally, no.

Q. Do you know whether the bank did or not?

A. No, not offhand.

Q. By what authority did you take the proceeds of those payments and apply them on that indebtedness?

A. According to the contract of sale.

Q. And that was your authority, the escrow instructions in that contract? A. Yes.

Q. What? [127] A. Yes.

Q. That is the only authority that you had, was

(Testimony of Ralph C. Bailey.)

it not? A. In writing, yes.

Q. You had authority that wasn't in writing?

A. I don't recall that.

Q. Then why were you so specific in saying that was the only—(Interrupted)

A. I wanted to point out the issue, that we could have had conversations that I don't remember anything about.

Q. You sure now that you didn't have any conversations? A. No, I am not sure.

Q. Then the special account of July 9th was set up entirely for your benefit, or the bank's benefit, shall be say? A. That's right.

Q. And prior to that time by virtue of the authority vested in the escrow department of your bank under the terms of the escrow instructions here you had applied the proceeds of payments of this contract as they were received?

A. Yes.

Q. And then you established on the 9th day of July a special account; who had the authority to draw checks on that special account?

A. Mr. Kaye, and we used it as a debit memo form.

Q. What, you have no, you have no present recollection of any conversation that you had with Mr. Kaye at that time?

A. Well, I think we had some, but I can't bear it out, [128] and I can't prove it, so—(Interrupted)

Q. Now, do you now after this length of time have any recollection of why you did not take the

(Testimony of Ralph C. Bailey.)

entirety of the one thousand forty-four dollars, fifty-one cents that was in the special account on the 21st day of July; you set up that now for your own use and benefit, why didn't you take all of it?

A. I still do not recall, George. Possibly I didn't make the entry myself.

Q. You, actually if you set this account up, Ralph, for the purpose of keeping clear and concise records as to the distribution of the proceeds of this account, why did you allow Mr. Kaye to write checks against it?

A. There is another reason in there that I do not remember.

Q. There must have been. Mr. Bailey, what was the outstanding balance of the indebtedness due from Mr. Kaye to the Bank of Fairbanks on the 9th day of April, 1952?

Mr. Johnson: If the court please, I fail to see that that has any bearing upon the issues in this case. It is not proper cross examination. The suit was started on April 23rd, 1953, or '52, and at that time the allegations were made in the complaint as to the outstanding indebtedness. Since that time the notes have been introduced and they are the evidence of what was due and owing and what was due and owing April 9th has no bearing on this case at all so far as I can see. [129]

The Court: Objection sustained.

Mr. McNabb: Your Honor, I propose by that question to show that between the 10th day of May, after the 8th day of April, Judge, of 1952, though

(Testimony of Ralph C. Bailey.)

the bank had in its possession a total of one thousand and forty-four dollars, fifty-one cents which it could have then applied against this debt to stop the interest from running on that amount of money, they chose to hold it in some place which we have yet to ascertain and did not apply it as the proceeds were received, and the interest continued to run until the 21st day of July, 1952. That matter, if nothing else, when they had previous to that time immediately applied the proceeds of each payment and did in this instance subsequently apply those proceeds, then the interest should not have been allowed to run on that fifteen thousand or fifteen thousand dollars less the sum of two thousand one hundred seventy-seven dollars, your Honor; and I would like to know why they didn't apply these proceeds to stop that interest from running, sir.

Mr. Johnson: Well, if the court please, that is not a fair statement of the record. In the first place, there was no money held by the bank in April. In April they only had the one payment which was applied. Then on April 23rd they commenced their suit to foreclose based on the fact that all of the notes were then in default and had been for a long time. The matter that counsel is now referring to is something that has arisen after the suit was started and refers to the payments [130] that were made in May, June and July. They were held for a time in the special account and subsequently were withdrawn and paid. However, that special account, as the testimony shows, was Mr. Kaye's

(Testimony of Ralph C. Bailey.)

and he had the use of it at the same time. It doesn't make any difference to the issues in this case at all because the issues as defined by the pleadings are whether or not there was a valid agreement on the bank to waive its foreclosure rights. That is the issue here.

Mr. McNabb: First there must be a money judgment, your Honor. First there must be a money judgment and if the bank had this, was holding these funds in a special account and allowing the interest to run and I would like to point out to the court that the money was not held in a special account until the 9th day of July because by Mr. Bailey's testimony no such account was established and so they must have been kept in the vault or some similar place and they could have applied it immediately as they did each of the previous five payments.

The Court: Well, I think you should start with the date that you started your suit and if you want to show the conditions then thereafter why no doubt it would be admissible but as it is now, there is nothing to warrant starting back on the 9th of April.

Mr. McNabb: Well, Judge, that is the day from which the interest would have run on that balance and that is the only reason for starting there, sir, as of the 9th day of April and the interest continued to run on that particular balance. It ran from the 9th of April until the 21st day of [131]

(Testimony of Ralph C. Bailey.)

July, sir, at which time they applied eight hundred eighty-nine dollars.

The Court: Well, if that is a correct statement I can see a reason. I will overrule the objections to it.

Q. (By Mr. McNabb): Do you know now what the balance was due and owing as of the 9th day of April 1952?

A. Not offhand, but I will figure it here.

The Court: We will take a recess for 10 minutes.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 2:45 p.m., the court took a recess until 3:00 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Are you ready to proceed?

Mr. Johnson: We are ready, your Honor.

Mr. McNabb: Defendants are ready, your Honor.

RALPH C. BAILEY

the witness under examination at the time the recess was taken, resumed the stand for further recross examination.

Q. (By Mr. McNabb): In response to my last question, now, Mr. Bailey, there was what amount due on the indebtedness of Mr. Kaye on the 9th day of April, 1952?

A. My records show and indicate twelve thousand eighty-eight dollars, eighty-nine cents principal.

Q. And the bank did receive on the 10th day of

(Testimony of Ralph C. Bailey.)

May the [132] sum of three hundred forty-nine dollars, fifty cents by reason of this contract, escrow 691, did it not? A. Yes.

Q. And that amount of money was received on May 10th and not applied until July 21?

A. That's right.

Q. And the bank did receive the sum of three hundred forty-eight dollars, seventeen cents on June 5, '52 and that amount of money was not applied until July 21, '52?

A. That's right.

Q. And on July 11th the bank received three hundred forty-six dollars, eighty-four cents and that amount not applied until July 21, 1952?

A. That's right.

Q. At which time, Mr. Bailey, the bank did apply eight hundred eighty-eight dollars, nine cents as against the principal of the Plaintiff's Exhibit "I" and sixty-nine dollars, seventy-three cents interest; is that correct? A. That's correct.

Q. Now then, had you applied those sums as you received them interest would not have been due on that obligation in the amount of sixty-nine dollars, seventy-three cents over that period, would it? A. No.

Q. So the sixty-nine dollar, seventy-three cent figure as far as interest is concerned is incorrect is it not? [133] A. That's right.

Q. Now, during the course of the subsequent payments and I believe you testified that your records indicate that Josephine Boussard has made

(Testimony of Ralph C. Bailey.)

each of her payments according to the tenor of this contract of purchase and sale which is in evidence here? A. That's right.

Q. Those payments were not applied toward the satisfaction of these debts as they were made, as the payments were made, were they?

A. No. Part of them went there and then as I have stipulated in my testimony before why they went to this special account.

Q. Well, even according to the escrow instructions which you of course were in possession of and those escrow instructions provide that the payments should be applied toward the reduction of this mortgage indebtedness of Mr. Kaye, that was not done was it, as the payments were received?

A. No.

Q. And consequently, the interest as it has accrued throughout the period from the 8th day of April, 1952, is incorrect so far as your instructions and the receipt of the money was concerned?

A. Admittedly, yes.

Q. Prior to the execution of the contract, did you have any discussions with anyone concerning the sale of this property? [134] A. I did.

Q. With whom did you have those discussions, or that discussion? A. Mr. Lazar Dworkin.

Q. Where did those discussions take place?

A. In the Bank of Fairbanks.

Q. How many such discussions did you have?

A. Two that I recall.

Q. Do you recall when they were?

(Testimony of Ralph C. Bailey.)

A. Just previous to the consummation of this sale of the piece of property.

Q. What was the nature of those discussions?

A. He had asked if we would settle for funds received on this proposed escrow at that time to liquidate the mortgages and I told him that we would not settle for that. We felt like we wanted more money to liquidate the indebtedness at an early date.

Q. Did he advise you that there was an opportunity or that he had an opportunity to sell the property? A. He did.

Q. Did he tell you to whom he had the opportunity to sell it? A. He did.

Q. Did you have any discussions with him at that, or any subsequent time concerning the ability of the proposed purchaser to pay? [135]

A. I do not recall that.

Q. Did you have any discussion with him concerning the credit standing or the credit rating of the proposed purchaser?

A. I don't remember that.

Q. Did you, did he name the proposed purchaser to you? A. Oh, yes.

Q. And what was the name of the purchaser?

A. Josephine Boussard.

Q. And she did subsequently, of course, acquire the interest of Mr. Kaye in the property, or execute with him a contract of sale for the property, did she not? A. She did.

Q. Her subsequent conduct in making the pay-

(Testimony of Ralph C. Bailey.)

ments that she had been and was at that time an excellent credit risk, is that not true?

A. That is correct.

Q. And you knew that to be true at the time that she made the payments?

A. I felt that way about it, yes.

Q. Did you at any time discuss with Mr. Dworkin the preparation of this particular contract of sale?

A. No, I had no interest in it. It is not my duty to get it prepared.

Q. No, I realize that, Ralph, but I want to know if you did in fact, do you now have any recollection of having ever talked with Mr. Dworkin concerning the preparation of the actual instrument? [136]

Mr. Johnson: If the court please, I am going to object now on the ground that the proper foundation hasn't been laid because so far as I can determine up until now, Dworkin's status in this business is completely unknown. I don't know if he was representing Kaye's or Boussard, or who, and I think that ought to be established because otherwise it would be immaterial and certainly not proper cross examination.

The Court: Objection overruled.

Q. (By Mr. McNabb): Do you have any present recollection of whether you did talk with Mr. Dworkin concerning the preparation of the contract?

A. We could have. I couldn't say yes or no. I don't remember that part of it. It is hard to remember two and a half years ago.

(Testimony of Ralph C. Bailey.)

Q. Do you have any recollection at this time as to whether you discussed with him the attorney who was to prepare the contract?

A. No, I don't remember that.

Q. Do you have any recollection of having called any attorney and given, relayed to any attorney the present unpaid balance of the indebtedness of Mr. Kaye to the bank?

A. That could have been, but I don't remember.

Q. You could have done that?

A. I could have done it, sure.

Q. But you just do not know, have any definite recollection; is that it? [137] A. No.

Q. Did you, let me ask you this, Ralph, has the bank ever since the 9th day of November received two hundred dollars a month and the interest on the unpaid balance of the four notes as they were reduced by the previous payment?

A. Will you restate that?

Q. Has the bank, has the Bank of Fairbanks, the plaintiff here, received the sum of two hundred dollars per month since the 9th day of November 1951, plus eight per cent interest on the then unpaid balance of the four notes?

A. No, the bank has not received it all, no.

Q. The bank has not received it?

A. We have taken it in over our counter, but as far as being applied against the indebtedness of Kaye, the mortgage notes, no. It has not all gone to that one particular place.

(Testimony of Ralph C. Bailey.)

Q. First, however, all of those payments have been made, have they not?

A. The payments, that—(Interrupted)

Q. By Josephine Boussard?

Mr. Johnson: If the court please, it seems to me this is entirely repetitious. He has been over it a hundred times.

The Court: It seems to be necessary. Overruled.

Mr. Bailey: You are asking me if all the moneys that I have received from Josephine Boussard to be applied against the escrow has gone to the indebtedness of Mr. Kaye? [138]

Q. (By Mr. McNabb): Well, you have already answered that in the negative, have you not?

A. That's right.

Q. Now, then, my next question was, have not each of the two hundred dollar installments as provided by the contract been made?

A. By the contract, right. They have been made.

Q. And in addition to the two hundred dollar installments paid when due, the purchaser paid eight per cent interest on the then unpaid balance of those four notes, is that not correct?

A. No, it is not set up that way. She has paid eight per cent interest on fifteen thousand, which is provided for by the escrow.

Q. And the fifteen thousand is the total of four notes as they existed when the contract was written?

A. That's correct.

Q. And the contract was written for the pur-

(Testimony of Ralph C. Bailey.)

pose of requiring this purchaser to make payments on those four notes, was it not?

A. Yes, according to the contract.

Q. Now then, as she made her payments, the fifteen thousand indebtedness should have been reduced. She has paid interest on fifteen thousand at the rate of eight per cent per annum, has she not?

A. That is right according to the contract. [139]

Q. All right, she paid them right down the line each and every one of them?

A. That's right.

Q. And the escrow instructions along with this contract instructed the bank to apply those payments to the reduction of the mortgage indebtedness for which this action is instituted?

A. That's right.

Q. And from the first date of any, that any such payments was made and that was on the 9th day of November, 1951, you applied immediately and forthwith without any hesitancy without any delay, without running through any additional bank account the payments for November, December, February March and April, did you not?

A. That's correct.

Q. And there was no special account at all?

A. No.

Q. And then you established a special account having held the May, June payments you then established a special account, did you not?

A. That's right.

Q. And the special account was established on

(Testimony of Ralph C. Bailey.)

the 9th day July? A. That's right.

Q. And on the 11th day of July you received an additional three hundred forty-six dollars? [140]

A. That's correct.

Q. And that amount of money, the accumulation of those four payments was in the amount of one thousand forty-four dollars, fifty-one cents, and on the 21st day of July you applied eight hundred eighty-eight dollars, and nine cents to the principal of the mortgage indebtedness, did you not?

A. That's right.

Q. How was that particular transaction handled, Ralph?

A. You mean the, whereabouts in the bank and who did it.

Q. No, sir. I mean what mechanical transactions took place transferring from the special account the eighty, the eight hundred eighty-eight dollars, nine cents?

A. It is what we bankers term as a credit memo to an individual's account.

Q. That was a debit memo to Mr. Kaye's special account? A. Special account.

Q. You established that for the particular purpose of ease in banking procedures and so that you might have a record?

A. I might have inferred that, but not necessarily, particularly, I mean. I think it was set up for some other funds that he had coming in from other sources at the time also. We used that particular account. Now, I believe it would become

(Testimony of Ralph C. Bailey.)

necessary for Mr. Kaye to help establish that account since his name was on the signature card of that account and therefore, Mr. Kaye was aware

Q. Well, let me ask you this, Ralph, in view of your [141] previous conduct, that is when I say your I mean the bank's, in view of your previous conduct during the periods of November, December, February, March and April, it was not necessary that such an account be established, was it with which to facilitate the bookkeeping and the banking procedures to see that this money was in fact applied against Mr. Kaye's indebtedness to you?

A. That would be a matter of argument, and the difference of two people. One person might elect to do it this way, another person might elect to do it another way.

Q. I say, though, it wasn't necessary, was it?

A. In my opinion at that time evidently it was necessary.

Q. But your opinion in the five preceding months was different, was it not?

A. Evidently so. That is why, because we did apply it direct.

Q. Mr. Bailey, when you made the, when you made the funds which you received from Josephine Boussard available to Mr. Kaye to do with as he saw fit and that is what you did, when you established this special account, was it not?

A. It wasn't meant that way.

(Testimony of Ralph C. Bailey.)

Q. I am not interested in what was meant. I am interested in what occurred?

A. What occurred it was put in the bank account and withdrawn by someone else other than ourselves.

Q. There is no question according to the instructions on [142] that contract of purchase and sale that you were to apply those payments toward the indebtedness? A. That's right.

Q. And regardless of your previous conduct in the matter you allowed these payments to be deposited in a special account upon which Mr. Kaye could write checks, did you not? A. Yes.

Q. And so then, if the bank did not receive the payments as according to the, two hundred according to the contract and interest according to the contract, the payments that Josephine Boussard made each and every month in strict compliance with that contract, it was through no fault of Josephine Boussard that you didn't get it, was it?

A. No.

Q. And so you made available these funds for Mr. Kaye to write checks on and so on?

A. No, I didn't.

Q. Who did that?

A. Evidently he took them out of his account, which he was allowed to draw on.

Q. Who put them into the account, Mr. Bailey?

A. I did that. I put them into the account.

Q. So it was the bank's fault if it didn't get the

(Testimony of Ralph C. Bailey.)

two hundred a month and interest and not Josephine Boussard's?

A. No, it is not set up that way, George. I am sorry.

Q. Well, everybody ought to be sorry about this thing, [143] but that is what happened though, wasn't it?

A. That is what happened. Someone else got the funds and we all know who got the funds.

Q. And the money was paid in and escrow instructions provided for the bank to accept it and take it and apply it to the debt?

A. That is admitted.

Q. And there wasn't anything about setting it up in a special account, and you allowed months to elapse before you took any money out of that account? A. I understand.

Q. You did that, didn't you?

A. Yes, that's right.

Q. And then consequently it was nobody's fault but yours, and I use the pronoun as meaning the Bank of Fairbanks, if you didn't get two hundred a month and interest; isn't that correct?

A. No.

Q. Whose fault is it?

A. I feel like those funds were put in that special account for a special purpose.

Q. Ralph, you feel like it but I want to know what the truth of the matter is?

A. The truth of the matter, George, we know the truth. Let's get down to basic facts. We know

(Testimony of Ralph C. Bailey.)

why they were put in the account. We know we should have taken them right away. I [144] am wrong, admittedly. We should have taken them at each time. They were put in this account and went to that account to withdraw those funds to liquidate the note. They should have been there and they weren't.

Q. You didn't even go to the account the day the money was deposited?

A. That is admitted.

Q. And by the same token you had no authority to put it in a special account?

A. No, I don't agree with that.

Q. Does it say anything in the escrow instructions concerning a special account? A. No.

Q. It just says she will pay two hundred a month and interest in the bank?

A. I think that is within the prerogative of the bank to put it in a special account and withdraw it from the bank.

Q. Ralph, you didn't elect to do it January, February, March or April?

A. That's right, I know I didn't.

Q. As far as the indebtedness to the bank of Josephine Boussard, the bank has done very little right, has it?

A. That I don't agree with you.

Q. Mr. Bailey, it says in the escrow instructions you are instructed further that from the outset and I think that meant forthwith, from the outset payments of two hundred plus [145] interest accrued

(Testimony of Ralph C. Bailey.)

at the rate of eight per cent per annum as indicated by notes and mortgages held by the bank are to be applied by the bank toward the payment of said notes and mortgages. You didn't do that, did you?

A. Well, we did it in some instances directly. Indirectly in other instances. Some instances it wasn't there to get and, of course, naturally that is our fault. I understand that. It is admitted.

Q. You just didn't abide by these instructions, did you? A. As far as it went, yes.

Q. Now, Ralph, don't hedge with me now. Tell the truth.

A. I am not hedging with you. I am just trying to tell you yes as far as it went.

Q. How far does it go then?

A. Directly up until July we put it in there and we got part of it. After that naturally I didn't take the money when I supposed to take it so consequently I didn't get it. That is our error.

Q. You did everything just great up until you established that special account, didn't you?

A. That is admitted.

Q. And from the date of the establishment of the special account, which was the 9th day of July 1952 you completely disregarded the escrow instructions, did you not, aside from occasionally taking some money out of that account?

A. Yes. [146]

Q. I believe you did have a conversation with Mr. Kaye, did you not, after the contract had been put in escrow?

(Testimony of Ralph C. Bailey.)

A. I believe that's right, yes.

Q. Do you recall when that was?

A. I said this morning in my testimony maybe two or three months that I rather think now, looking back on it and trying to think when it was, it was within two or three or four weeks afterwards. I do not recall the month or the day or even whether it was in '51 when this thing started, or '52.

Q. That was the one where you said that Mr. Johnson was there, Phil Johnson?

A. Yes, and I believe further, I don't think Mr. Dworkin was there. I don't recall.

Q. And the topic of that conversation was?

A. Well, apparently Mr. Kaye had learned that we weren't satisfied with the repayment program on the mortgage notes and he came in and he stated to me that he had been informed that we were satisfied and we would go along according to the repayment program and the stipulations of the escrow agreement which was not true, and at that time is when we informed him directly that we were not satisfied with the repayment program.

Q. That was just, that conversation took place very shortly after the contract was—(Interrupted)

A. Fairly shortly, George. I can't remember. It could have been two or three weeks or a month. It could have been a week after. I don't know. [147]

Q. Do you have any recollection as to why you allowed, why you allowed these payments of May, June and July to accrue before you applied them?

A. No, I don't remember and I testified to that

(Testimony of Ralph C. Bailey.)

several times before, and I believe in one case along the line I testified that our attorney advised us to hold them up at that time.

Q. But you don't recall whether he did or not?

A. No, I don't recall whether he did or not.

Q. However, you recall, of course, that the action was filed on the 21st of April, 1952?

A. Well, I knew it was going to happen, yes.

Q. And then on the 21st of July after having held those where, Ralph, do you know or have you ever been able to ascertain yet where you held those funds? A. Yes.

Q. Where were they?

A. In form of cashier's check made payable to A. K. Kaye and or the Bank of Fairbanks. They were held under double custody in a bank vault.

Q. And then you applied them to the note on the 21st of July? A. That's right.

Q. How much work do you think it would require you to ascertain what should be the present unpaid balance on the four notes if you had applied the payments to the satisfaction [148] of the notes as they were received?

A. Possibly a couple of hours.

Q. You will be able to do that this evening for us?

A. I won't promise. I will make an attempt to.

Q. For the purposes of making that computation you will certainly need this payment book, will you not, receipt book as you termed it?

A. If it will please you, I will use the bank

(Testimony of Ralph C. Bailey.)

records here which I think will coincide here and I have already checked it off as to payments, etc.

Q. Do the payments in this book here coincide entirely in their entirety with your payment book?

A. They do.

Mr. McNabb: I am going to move to admit Defendant's Identification A into evidence, your Honor.

Mr. Johnson: That's all right. It's already been admitted, hasn't it?

Mr. McNabb: It has not. You evidently have no objection?

The Court: It may be admitted.

Clerk of Court: Defendant's Exhibit No. "3".

(Defendant's Identification A was received in evidence as Defendant's Exhibit No. "3".)

Clerk of Court: Defendant's Identification D.

(Receipt from Bank of Fairbanks dated 8-10-54 was marked Defendant's Identification D.) [149]

Clerk of Court: Defendant's Identification E.

(Receipt from Bank of Fairbanks dated 8-10-54 was marked Defendant's Identification E.)

Q. (By Mr. McNabb): Now, of course, Mr. Bailey, you know that this book, receipt book is not now complete, do you not?

A. That is correct.

Q. And in what fashion is it not complete?

A. The only thing that is not entered on there, I believe in checking it during the lunch hour, is

(Testimony of Ralph C. Bailey.)

the August 10th payment which has been received.

Q. I will show you Defendant's Identification D and E and ask you if you know what those are, please?

A. They are receipts of the payment or payments made August 10 and there is two hundred dollars principal, seventy dollars, thirty-three cents interest on the fifteen thousand portion of the loan at eight per cent, and fifty-seven dollars, fifty cents, six per cent on the eleven thousand five hundred, which represents the August 10 payment.

Q. Mr. Bailey, you have I take it carefully examined the records in reference to the payment of this amount of money and you no doubt note the amount that the interest decreases each month on the sum of fifteen thousand dollars, if equal monthly installments at the rate of two hundred are paid on it? [150] A. That is correct.

Q. You know what that is?

A. I realize that, yes.

Q. Those payments, the interest reduces at a steady rate each month, does it not, and the payment books and your records indicate that such has occurred since Josephine Boussard first started making her payments on this?

A. On the escrow portion, that's correct.

Q. But, the indebtedness of Mr. Kaye has not been so reduced, has it?

A. No, that is correct.

Q. If the entries on these identifications were put in the book this payment book would be total

(Testimony of Ralph C. Bailey.)

and complete and full and accurate record of the payment made by Josephine Boussard to date, would they not? A. That's correct.

Mr. McNabb: Your Honor, I am going to move the admission of Defendant's Identification D and E.

Mr. Johnson: We have no objections, your Honor.

The Court: It may be admitted.

Clerk of Court: Identification D is Defendant's Exhibit No. "4", and Identification E is Defendant's Exhibit No. "5".

(Defendant's Identification D was received in evidence as Defendant's Exhibit No. "4".)

(Defendant's Identification E was received in evidence as Defendant's Exhibit No. "5".)

Mr. McNabb: I have no further questions.

Redirect Examination

Q. (By Mr. Johnson): Mr. Bailey, this special account that has been referred to, at the time it was set up did Mr. Kaye or Mrs. Kaye offer any objection to that procedure?

A. I don't rightfully recall, but evidently not. We had, Mrs. Kaye was not a signer on the account if I recall correctly. It was just Mr. Kaye. He was aware of it and he would have to be aware of it even though I do not recollect the conversation in regard to the account when it was opened.

Q. Did Mrs. Boussard ever offer any objection to it?

Mr. McNabb: Now, just a minute. I am going

(Testimony of Ralph C. Bailey.)

to object to that, no proper foundation being laid to, no showing that she had any knowledge of it, not proper redirect examination, has no bearing on the issues of this case.

The Court: Objection overruled.

Mr. Bailey: She was not aware of it as far as I know.

Q. (By Mr. Johnson): In this contract which is Defendant's Exhibit "2", counsel referred to a paragraph in the escrow instructions whereby you are instructed further at the outset, from the outset that payments of two hundred dollars plus interest [152] accrued at the rate of eight per cent per annum as indicated by notes and mortgages held by the bank are to be applied by the bank toward the payment of said notes and mortgages. Had you at any time prior to this, or the negotiations of this agreement agreed to accept those two hundred dollar payments as complete payments on the four notes that you had held at that time?

A. No.

Q. And subsequent or around the time that this contract was being negotiated you say you had some conversations with Mr. Dworkin? A. I did.

Q. And during those conversations he attempted or wanted you to accept this arrangement?

Mr. McNabb: Now, just a minute. I object to that as being improper recross examination, no proper foundation laid for it, no such testimony in the record.

The Court: Objection overruled.

(Testimony of Ralph C. Bailey.)

Q. (By Mr. Johnson): Mr. Dworkin had attempted to or—(Interrupted)

Mr. McNabb: Now, I object to that as being leading and suggestive. Now start over.

The Court: Objection overruled.

Q. (By Mr. Johnson): Mr. Dworkin at the time this contract was being negotiated, did he attempt or anyone to get you or the Bank of [153] Fairbanks, to get you to agree to accepting this in lieu of the payments provided for by the notes and mortgages? A. He did.

Q. Did you agree to make any such change in the provisions of the notes and the mortgages?

A. We did not.

Q. Did you sign any writing of any kind at any time to that effect? A. No.

Q. After this contract was placed in escrow and you began receiving payments and they were credited on the Kaye obligations you say you had a talk with Mr. Kaye after that at which time you insisted that he must keep up the other payments that were due on the notes as well; is that correct?

A. That's correct.

Q. And when he failed to do that in April or up to six months, when in April of 1952 it was at that time that the bank decided to exercise its right to foreclose its mortgages; is that correct?

A. That's correct.

Q. And this present case was filed at that time?

A. It was.

(Testimony of Ralph C. Bailey.)

Q. Under the provisions of the mortgages which gave you that right; is that correct?

A. That's correct.

Q. After that you did accept and receive some payments on account? [154]

A. We did.

Mr. McNabb: On account of what?

Q. (By Mr. Johnson): On account of Kaye's mortgages, but in filing your suit you had declared the entire balance due; is that correct?

A. That's correct.

Q. And they were due or past due at that time?

A. That's right.

Q. The four notes that are now in litigation here and this case has been dragging on ever since that time waiting to get to trial; is that correct?

A. That is my understanding.

Q. And during that time payments have been made from time to time by Miss Boussard which substantially have been credited to the Kaye obligations, is that so? A. That's right.

Q. And the special account which was set up in July was set up after you had declared these Kaye notes to be due and owing and had filed your suit; isn't that correct? A. That's correct.

Q. Do you have that special account ledger?

A. I do.

Q. Will you produce it, please.

Clerk of Court: Plaintiff's Identification No. 11, consisting of two sheets. [155]

(Testimony of Ralph C. Bailey.)

(Ledger sheets (2) of A. L. Kaye, Special Account, in Bank of Fairbanks, were marked Plaintiff's Identification No. 11.)

Q. (By Mr. Johnson): Now, I will show you Plaintiff's Identification No. 11 which consists of two sheets and ask you to identify it, if you can?

A. Part of the permanent records of the bank on the account of A. L. Kaye, Special Account.

Q. Is that the account ledger sheet or the ledger sheet of the account which was set up in July of 1952? A. It was.

Q. And does it show all of the deposits and withdrawals that were made to that account from its inception down to date? A. It does.

Q. Is it true and correct so far as you know?

A. I beg your pardon, not to date. This goes on to a period of time. We quit putting it into the account July 14, 1953. That was the last one.

Q. Well, I mean any sort of deposits whether they came from the Boussard payments or what, those sheets show all deposits and all withdrawals that were made? A. That's correct.

Q. And the present balance?

A. Yes. [156]

Mr. Johnson: We would like to offer in evidence Plaintiff's Identification 11, if the court please.

Mr. McNabb: I am going to object to that as having no bearing on the issues of this case, and having no part in it. If the plaintiff established a special account for the benefit of Leo Kaye in con-

(Testimony of Ralph C. Bailey.)

travention of the agreement of these parties and placed moneys there, it has no bearing on the outcome of this case nor on any of the issues involved herein, your Honor.

Mr. Johnson: If the court please, counsel has made a great deal about this special account in cross examination and I think the court should be apprised of what the facts are concerning it.

The Court: Objection overruled. It may be admitted.

Clerk of Court: Plaintiff's Exhibit "J".

(Plaintiff's Identification No. 11 was received in evidence as Plaintiff's Exhibit "J".)

Q. (By Mr. Johnson): Now, Mr. Bailey, previously I believe you stated that you would during this recess or the recess after today compile a statement of receipts and disbursements in your own handwriting, identifying the items for the benefit of the court? A. I will.

Q. From the records which have been introduced? A. I will. [157]

Mr. Johnson: Subject to that, subject to the right to present that statement, if the court please we have no further questions.

Recross Examination

Q. (By Mr. McNabb): Ralph, I would like to ask you one, two questions, I would like you to examine the four notes which are in evidence and tell me whether it is not true that on fifteen thousand dollars worth of indebtedness which was due

(Testimony of Ralph C. Bailey.)

to the bank from Mr. Kaye on the 9th day of November, 1951, the day upon which Josephine Boussard first commenced making payments, is it not true that the six months preceding you received two hundred seven dollars, seventy-eight cents as entire payment on fifteen thousand and in the period six months following her receipt, that you received twenty-one hundred seventy-two dollars?

Mr. Johnson: If the court please, I don't quite understand the purpose of the question. After all, what happened prior to the time of this contract certainly has no bearing on the case. It is admitted all the way around that at the time the contract was signed on October 9, 1951 there was presumably fifteen thousand in principal due the Bank of Fairbanks from the Kaye's. What they had paid prior to that time and I understand it to be the import of Mr. McNabb's question certainly couldn't have any bearing on the situation. I don't care particularly but because the evidence is there, [158] but would show it anyway.

The Court: I didn't understand that his question would include such a thing as that.

Mr. Johnson: Maybe I misunderstood. That was my understanding of the question.

The Court: I understood you were to give the total of the whole situation as shown by the total.

Mr. Bailey: What do you want to know, what I can take from these notes now?

Q. (By Mr. McNabb): I want to know if it is not true that on the six months preceding the date

(Testimony of Ralph C. Bailey.)

that Josephine Boussard took over the payments to the bank of the defendant, evidenced by those notes, in the six months immediately preceding her assumption of those notes, you received next to nothing, two hundred or less in payments?

A. I know nothing about assumption of any notes.

Q. And in the six months immediately afterwards you received very near twenty-two hundred?

A. That is true. That takes another calculation. If you care to take a recess.

Q. No, it doesn't either. You have already testified that there was two thousand one hundred seventy-two dollars, eighty-seven cents paid in the first six months after she took over. That is a matter of record?

A. Yes, you are right there. [159]

Q. Now, if you will go back by an examination of those notes and there take only just a moment, you will be able to testify that in the preceding six months that you received about two hundred on fifteen thousand dollars worth of debts, all of which notes had been in default and one of them since 1945?

A. You are speaking of interest and principal both?

Mr. Johnson: Well, I will still raise the point, your Honor, that what difference does it make? I can't see that it has any bearing whatever.

The Court: Well, I wanted something here that had the total received and total paid out, and what

(Testimony of Ralph C. Bailey.)

the credit would be and debit, whatever it is. Mr. Bailey, as I understood was to prepare that. That is what I think it means.

Mr. Bailey: Well, yes, I had received interest on these notes before this contract was consummated, or its inception.

Q. (By Mr. McNabb): I know, Ralph. I know that you had. I want to make it, if I can by your testimony, abundantly obvious to the court that the bank was stuck with fifteen thousand dollars worth of notes and that in the preceding six months you had received about two hundred dollars worth. Now, you have already testified that you knew Josephine Boussard to be a good credit risk and her subsequent conduct has proven that point of yours to have been true? [160]

A. That's correct.

Q. Now, I want to show this court that the bank was holding fifteen thousand dollars worth of notes on Leo Kaye that you had received about two hundred dollars or perhaps less in the preceding six months, and that you had an opportunity to have those notes paid off without the necessity for a lawsuit and someone you knew or you had good reason to believe would in fact pay them off, and her subsequent conduct proved that such was her intention, and she has gone about that in a most business-like fashion?

A. I can't answer that question.

Mr. Johnson: We object, if the court please, on the ground that it is not within the issues. The

(Testimony of Ralph C. Bailey.)

bank had perfectly good security for its indebtedness.

Mr. McNabb: Answer the question, Ralph. The Judge has not overruled it.

Mr. Bailey: We have, your Honor, yes, received in interest payments various intervals before the contract of sale came into effect and that we had received no principal payments in any preceding that.

Q. (By Mr. McNabb): Or interest?

A. Well, interest, that's right.

Q. What payments if any were made from and after the 1st day of June, 1951 on Exhibit "E" until Josephine Boussard made a payment on or about the 9th of November, or 8th of October? [161]

A. We received two interest payments on Exhibit "E".

Q. On June, from the month of June '51?

A. Yes, one in September and one in October '51.

Q. And how much were they?

A. One of one hundred sixty-four dollars, and the other one six dollars, thirty-eight cents.

Q. 9-11-51, that is the 9th day of November, is it not? A. That's right.

Q. And the previous payment made on that note was what? A. March 16th.

Q. So in the preceding six months there was no payment made on that, not principal or interest? A. That's correct.

Q. That is what I wanted testified to. Now then,

(Testimony of Ralph C. Bailey.)

look on "G". What payments did you receive between the first of June, 1951 on that note?

A. On the same date?

Q. No payment in the preceding six months?

A. That's right.

Q. Now, what have we here? "E", "G", what about "C"?

A. "D" is the same.

Q. No payments on principal or interest either one, just as the other two. Now then, on "I" you did receive a payment, did you not?

A. No, it is the same as those.

Q. The same as that? [162]

A. That's right.

Q. No payments at all in the preceding six months on the entirety of the fifteen thousand dollar obligation; and then Josephine Boussard took over and in the proceeding six months you received two thousand dollars.

Mr. Johnson: We object to the statement Josephine Boussard took over, your Honor.

The Court: Objection overruled.

Mr. Bailey: That's right.

The Court: We will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 3:50 p.m., the court took a recess until 4:00 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Counsel ready to proceed?

Mr. Johnson: We are ready, your Honor.

The Court: Call your witness.

Mr. Johnson: I have no further witnesses at this time, and subject to the right of Mr. Bailey to submit the statement which the court wants, we rest.

Mr. McNabb: Your Honor, then at this time I am going to move the court for a verdict in favor of defendants on the grounds that the plaintiff has failed to establish a prima facie case, the plaintiff being a corporation, a domestic corporation of the Territory of Alaska and has failed to prove by sufficient evidence that it has paid its annual tax and [163] filed its annual report as is required by domestic corporations before it can proceed in an action in the Territory of Alaska.

The Court: Motion denied.

Mr. McNabb: I would like to call Mr. Dworkin, please.

LAZAR DWORKIN

a witness called in behalf of the defendants, was sworn and testified as follows:

Direct Examination

Q. (By Mr. McNabb): State your name, please.

A. Lazar Dworkin, 225 Wendell Street.

Q. Mr. Dworkin, how long have you resided in Alaska, Fairbanks, Alaska?

A. Since May, 1947.

Q. You are, I believe, familiar with a real estate contract concerning some property, real and personal property being the property of Leo and Jean Kaye and upon which the Bank of Fairbanks held four notes?

A. I am.

(Testimony of Lazar Dworkin.)

Q. Were you at any time appointed as an agent to secure a purchaser of that property by Mr. Kaye?

Mr. Johnson: We object to that as being merely a conclusion, if the court please, and no proper foundation laid. He can't make himself an agent by his own testimony.

The Court: Objection will be sustained.

Q. (By Mr. McNabb): Did you at any time have any conversations with Mr. [164] Bailey of the Bank of Fairbanks concerning the sale by Mr. Kaye of his interest in the property upon which the bank had mortgages? A. I did.

Q. Do you recall the month during which you had such a conversation with Mr. Bailey?

A. Sometime during October, 1951.

Q. What was the purpose of discussing that property with Mr. Bailey?

Mr. Johnson: Well, if the court please, that is calling for a conclusion which the witness isn't qualified to make. We object to it. I think he can relate any conversation or the substance of them, but the purpose is certainly a conclusion.

The Court: I take it this is to show the interest of Mr. Bailey, the witness, in the property.

Mr. McNabb: Not at all, sir, not the interest of Mr. Bailey, but the, it was, I am not going to testify in reference to this matter. If the court chooses to sustain the objection I will rephrase the question, your Honor.

The Court: Well, I will sustain the objection.

(Testimony of Lazar Dworkin.)

Q. (By Mr. McNabb): What was said during that conversation between you and Mr. Bailey in reference to the property of Mr. Kaye?

A. I advised Mr. Bailey in the early part of October 1951 that I had a proposed purchaser for the property and I [165] wished to see the amount of the indebtedness that was due against the property. He took out a number of notes and mortgage aggregating approximately fifteen thousand dollars all of which were due and overdue and I told him that in order to make the transaction, unless they agreed to take a stipulated amount every month no purchaser could risk going in there and the possibility of being foreclosed. And I told him I had a definite purchaser who would be willing to pay two hundred a month, plus interest. He told me no it really wasn't sufficient, he wasn't satisfied with it. Then he said, who was the purchaser and I gave him the name of the proposed purchaser, Miss Boussard. He said he knew her, said he would like to talk to her. I called Miss Boussard, told her to go see *Miss Boussard*, which she did. He turned her down. He called me up and told me he wasn't satisfied with the amount of the payments so I called him again the latter part of October and went to great length and he told me, well, it looks like these notes have defaulted, I think we will go along provided you designate the Bank of Fairbanks as the escrow agent and number two that the payments be made directly to the bank for the amount equivalent of the unpaid indebted

(Testimony of Lazar Dworkin.)

ness. He called Mr. Hurley while I was there and furnished him all the figures in the respective amounts. Mr. Hurley was to draft the papers. Mr. Hurley was indisposed about ten or twelve days, so I secured the papers and took them to Mr. Rivers and Mr. Rivers drew up all the papers. [166]

Q. After the papers were prepared and executed who placed them in escrow, if you know?

A. After the papers were all executed I took them in to the bank. I took them to the escrow window, I believe it was Phyllis Gidden, and said you had better call Mr. Bailey over to the window, this is one of his transactions. He walked over to the escrow window, examined the contract and papers and said, call Miss Boussard and let her pick up the escrow book.

Mr. McNabb: You may take the witness.

Cross Examination

Q. (By Mr. Johnson): I believe you stated that you had two conversations with Mr. Bailey, is that correct? A. That's right.

Q. And though one of them took place in the latter part of October; one took place in the first part of October and the next one took place in the latter part of October; is that right?

A. Well, I would like to correct that, Mr. Johnson. I don't know. I know it was during the month of October.

Q. And both of these conversations you say you had with Mr. Bailey where?

(Testimony of Lazar Dworkin.)

A. At the Bank of Fairbanks.

Q. But you are not certain when the second conversation took place? [167]

A. You mean by the exact date, I don't.

Q. Well, you say they took place in October, that is a reasonably short while altogether, it is about thirty-one days. Now did you have these conversations in the first half of October or in the last half of October?

A. I would say it was the early part of October, but they were within a pretty brief time because after the first conversation he wanted to have a check with my buyer and I sent Miss Boussard down to talk with him.

Q. Now, what consideration, if any, did you give to Mr. Bailey or the bank for this alleged agreement that you say he entered into?

Mr. McNabb: Now, just a minute. I object to that. There is no showing that there was any agreement entered into between Mr. Dworkin and the bank, and even if there was one, it has no bearing on the issues of this case and not binding on the parties here.

The Court: Objection sustained.

Q. (By Mr. Johnson): Isn't it a fact that Mr. Bailey told you specifically that he could not accept the proposal that you had made under any consideration as a full payment of the moneys due on the Kaye notes?

A. That is not a fact, Mr. Johnson.

Mr. Johnson: That's all.

(Witness excused.) [168]

Mr. McNabb: I would like to call Mr. Kaye if I may.

LEO KAYE

one of the defendants, appearing as a witness in his own behalf, was sworn and testified as follows:

Direct Examination

Q. (By Mr. McNabb): Will you state your name, please, sir. A. Alvin Leon Kaye.

Q. And you reside in Fairbanks, Mr. Kaye?

A. I do.

Q. Are you one of the defendants in this action?

A. I am.

Q. Did you on the 9th day of November of 1951 have outstanding and unpaid to the Bank of Fairbanks any promissory notes? A. I did.

Q. Were those notes at that time in default?

A. They were.

Q. In what amount were they, the aggregate amount?

A. Approximately fifteen thousand dollars.

Q. Since that date, Mr. Kaye, and by that I mean the 9th day of November 1951, have you made any payments toward the satisfaction of any indebtedness which you had on November 9, or presently do have? A. No.

Q. To the Bank of Fairbanks? [169]

A. No.

Q. You have made no payments on any of those notes? A. No.

Mr. McNabb: I have no further questions.

Mr. Johnson: No questions.

(Witness excused.)

Mr. McNabb: Your Honor, the defendant rests.

The Court: Very well. We will take a recess then until morning and we want just those figures that Mr. Bailey is going to produce.

Mr. McNabb: Yes, your Honor.

Mr. Johnson: I may want to recall Mr. Bailey tomorrow morning for a question or two. I am not certain at this time.

The Court: Very well, either side can have the same opportunity.

Mr. Johnson: Yes.

Clerk of Court: Court is adjourned until ten o'clock tomorrow morning.

(Thereupon, at 4:15 p.m., August 17, an adjournment was taken to 10:00 a.m., August 18, 1954.) [170]

Be It Remembered, that the trial of this cause was resumed at 10:00 a.m., August 18, 1954, plaintiff and defendant both represented by counsel, the Honorable Harry E. Pratt, District Judge, presiding:

Mr. Johnson: If the court please, yesterday Mr. Bailey was requested to make up a statement of the matters pertaining to the plaintiff's case and he informed me this morning that he is not ready with that statement and would like until two o'clock this afternoon to present it. Therefore, we move for a recess in the case now until two o'clock this afternoon.

Mr. McNabb: There is no objection on the part of the defendant, your Honor.

The Court: Very well. The motion is granted.

Clerk of Court: Court is at recess until two o'clock this afternoon.

(Thereupon, at 10:05 a.m., the court took a recess until 2:00 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Counsel ready to proceed with the trial of the case of Bank of Fairbanks vs. Kaye?

Mr. Johnson: We are ready, your Honor.

Mr. McNabb: The defendant is ready, Judge.

Mr. Johnson: Mr. Bailey, will you take the stand.

Clerk of Court: You have been sworn Mr. Bailey before, sir. [171]

RALPH C. BAILEY

a witness appearing on behalf of the plaintiff, having been previously sworn, was recalled and testified further as follows:

Direct Examination

Q. (By Mr. Johnson): Mr. Bailey, since we were last in session have you had an opportunity to make a summary of the facts and figures concerning this matter as shown by the records of the bank which records have been admitted in evidence? A. I have.

Q. Do you have that record with you?

A. I do.

Mr. Johnson: Or summary.

(Testimony of Ralph C. Bailey.)

Clerk of Court: Plaintiff's Identification 12.

(Three work sheets prepared by the witness, Bailey, were marked Plaintiff's Identification No. 12.)

Q. (By Mr. Johnson): I will show you a joint identification and will ask you if that is the summary that you mentioned a minute ago?

A. It is.

Q. And is that in your handwriting?

A. It is.

Q. And is it true and correct as far as you are able to determine? A. It is. [172]

Mr. Johnson: We would like to offer this, if the court please.

Mr. McNabb: Do you have any other questions that you want to ask, Maurice, concerning this.

Mr. Johnson: No, I want to ask him one or two questions.

Mr. McNabb: Why don't you go ahead.

Mr. Johnson: All right.

Q. (By Mr. Johnson): Mr. Bailey, yesterday when Mr. McNabb was questioning you concerning the payments which had been made on the notes in question here prior to October 6, 1951 for a six months period prior to that time, it appeared from your testimony that the payments were less than had been made on the notes, that is six months period following October 6, 1951; do you have any explanation of how that might have arisen or come about?

Mr. McNabb: Wait just a minute now. I don't

(Testimony of Ralph C. Bailey.)

understand that question at all, your Honor. I don't know what he is getting at. It is too vague and too indefinite. I don't see what he is trying to prove. I object to it for that reason.

The Court: Will you make it a little clearer, Mr. Johnson.

Mr. Johnson: If the court please, yesterday Mr. McNabb in his examination of Mr. Bailey went into great lengths [173] to point out or have Mr. Bailey point out that the Kaye's had made very few payments on their indebtedness for the six months prior to October 6, 1951, which was the date that this contract of purchase and sale was entered into. Then as contrasted with that he had Mr. Bailey point out by looking at the notes that the first six months after this contract of purchase and sale was entered into that a considerable amount of money had been paid on the notes and was credited on the notes. I assume the purpose of that was to point out that the payments under the escrow were far greater than Kaye's had been willing to do by themselves and I thought that that opened the door for us to show why it was that during the six months period prior to the sale of the house the Kaye's hadn't made any particular payments on these notes, and why the bank had been willing to go along with that, and I thought that I would ask Mr. Bailey if he knew anything about the reasons why the bank did not require it.

The Court: You understand now what he wants?

Mr. Bailey: Yes, I do.

(Testimony of Ralph C. Bailey.)

The Court: Very well, will you answer?

Mr. McNabb: Now, I am going to object to the questioning as not being proper redirect examination and it is not at this time material, doesn't have any bearing on the issues of this case. If there was any such agreement there has been no proper foundation laid for it. It may call for hearsay testimony and it is not within the issues. [174]

The Court: Objection overruled. Go ahead and answer it.

Mr. Bailey: During that six months period we had been pressing Mr. Kaye for payment.

The Court: Are you speaking of before or after

Mr. Bailey: Before the contract of sale was entered into, your Honor. We had had several occasions to talk about payment on the unpaid principal balance of the notes. He indicated to me that he was proposing to sell the piece of property and therefore we did not push the matter at that particular time. No bank cares for a foreclosure. Consequently, we let it ride for a period of six or seven months before we received anything on the notes.

Q. (By Mr. Johnson): Then he did go ahead with a sale on October 6; is that right?

A. That's correct.

The Court: October 3, wasn't it?

Mr. Bailey: The sale was on October 9, '51.

The Court: I was getting the date of the commencement of the action.

Mr. Johnson: The commencement of the action

(Testimony of Ralph C. Bailey.)

your Honor, was five months later, in April of '52.

The Court: May I see that.

Mr. McNabb: Is this what you want, sir? It has not been admitted. [175]

Q. (By Mr. Johnson): Yesterday I believe you were in court when Mr. Dworkin was on the stand?

A. That is right.

Q. And I think you heard his testimony?

A. I did.

Q. As an officer of the bank at the time you talked with Mr. Dworkin would you have any authority to enter into such an agreement as mentioned?

Mr. McNabb: Now just a minute. I am going to object to that as calling for a conclusion, not within the issues of this case, no bearing on the issues of this case, no allegations that there was any such agreement.

The Court: Objection overruled.

Mr. Bailey: Not without authority from the Board of Directors of the corporation.

Mr. Johnson: That's all.

Mr. McNabb: You have no more questions, Maurice?

Mr. Johnson: No, I am through. We offer that in evidence.

Mr. McNabb: You don't have to renew. There is no occasion for it.

Mr. Johnson: Do you want to ask Mr. Bailey any more questions.

Mr. McNabb: Only as what may result from my

examination of this instrument. May we have just a few [176] minutes recess, Judge, so that I may examine this.

The Court: Ten minutes enough.

Mr. McNabb: Yes, I am sure it will be.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 2:15 p.m., the court took recess until 2:25 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Counsel ready to proceed.

Mr. Johnson: We are ready, your Honor.

Mr. McNabb: Yes, your Honor.

RALPH C. BAILEY

the witness under examination at the time the recess was taken resumed the stand for further

Cross Examination

Q. (By Mr. McNabb): Now, Mr. Bailey, on the compilation which you have just made, I show you Sheet Number 1, that sheet indicates that payments were received by the bank on escrow 691, that is the escrow concerning the property which the mortgages were on and which mortgage secured the notes from Leo Kaye to the bank. That is correct, is it not?

A. Not quite correct. Partially, yes. You said the escrow that secured the notes. That is not correct. The property secured the notes. The escrow that was in the bank that we derived funds from to apply against the note.

(Testimony of Ralph C. Bailey.)

Q. Yes, this is the same property that is involved? [177] A. That's correct.

Q. Your sheet shows that the bank received payments on escrow 691 on November 9, December 10, February 11, 10th of April and the 8th, 9th of March and the 8th of April. On each of those occasions the bank applied those payments directly to the payment of the notes; is that not correct?

A. That's correct.

Q. Now then, following that, the May, June and July payments were, the May, June payments were held in, I believe you said by cashier's check?

A. That's correct.

Q. And then on the 9th of July they were deposited to a special account of Leo Kaye which was then established on that date?

A. Not on the 9th of July, but on the 11th of July.

Q. On the 11th of July, and on the 21st of July the bank by debit memo applied nine hundred fifty-seven dollars toward, and eighty-two cents toward the payment of the notes?

A. To the payment of the note.

Q. Part of it to principal, part to interest?

A. That's correct.

Q. Now then, following that the payments were made continuously as called for by the contract, the August payment commencing in August and each month through, that is August of 1952 through July the 10th of 1953, the proceeds of the payments were deposited in the Kaye special account?

(Testimony of Ralph C. Bailey.)

A. Correct.

Q. Now that, all of those things are indicated on Page 1 of your exhibit. Now then, let's back up, and the bank by depositing those payments, that is from September 9th, '52 through June the, or July the 10th '53, plus eighty-six dollars, sixty-nine cents or a total of four thousand one hundred forty-four dollars and seventy-one cents was deposited to the Leo Kaye special account, that is twelve consecutive payments were deposited to the account. What became of that money, Mr. Bailey, four thousand one hundred forty-four dollars, seventy-one cents?

A. That was used during the normal course of business of Mr. Kaye and also by other debit memos to the account.

Q. Let me ask you this, sir, was any of that amount of money applied toward the liquidation of the Kaye note? A. No.

Q. None of it? A. No.

Q. Now then, when the bank deposited the money, that is this four thousand one hundred forty-four dollars, seventy-one cents to the account of Leo Kaye, the Leo Kaye special account, it did that in contravention of the escrow instructions attached to escrow No. 691, did it not?

A. I answered that both yes and no.

Q. Well, the escrow instructions do in fact provide that two hundred dollars a month plus interest on fifteen [179] thousand dollars to be ap-

(Testimony of Ralph C. Bailey.)

plied toward the reduction or the liquidation of the Kaye notes, does it not?

A. That's correct.

Q. And by depositing this money to Mr. Kaye's account the bank then put that, or those funds in a position from which Mr. Kaye could draw against?

A. That's right.

Q. And in fact he did draw against it?

A. He did.

Q. And there is in the escrow instructions attached to that contract, it provides specifically that the money, two hundred a month plus interest on fifteen thousand was to be applied toward the satisfaction of those notes, was it not?

A. That's correct.

Q. That wasn't done with these twelve consecutive monthly payments?

A. That's correct.

Q. Now then, we go to sheet number 2; the payments received by the bank under the escrow commencing on the 10th day of August and each month thereafter through the 10th day of December all dates in '53, those payments again were held?

A. Correct.

Q. And that is, you did the same thing with those as you did the payments of May, June and July of 1952?

A. That's correct.

Q. That is for a year you deposited the money to the [180] account of Kaye and then you reverted to your previous stand that is the stand that you took in May, June and July of '52 and held

(Testimony of Ralph C. Bailey.)

four payments? A. That's correct.

Q. And what became of those funds?

A. Those were disbursed to the various different notes on interest on December 11 and December 18th.

Q. Of 1953?

A. Of 1953, and the final of three hundred twenty-nine dollars, twenty-five cents was disbursed on January 13, 1954.

Q. Now, actually, Mr. Bailey, the interest on the notes on the unpaid balance of the notes as of July 21, 1952 continued to run at the rate of eight per cent, though the bank had in fact received seventeen payments and though the money was or had been available to the bank to apply to that indebtedness, nothing was done for a period of seventeen months during which the interest on that fifteen thousand, or the balance of fifteen thousand as of July 21, '52 continued to run?

A. It continued to run. There is a rectification there that should be made. I mean in the earned interest, yes. That is admitted.

Q. The interest continued to accrue and the bank had the funds or at least the bank had at one time had the funds to apply toward that principal reduction, which of course would have reduced the interest? [181]

A. That's correct, and we would only be entitled to the unpaid balance.

Q. Those funds were received and that situa-

(Testimony of Ralph C. Bailey.)

tion continued for a period of seventeen months?

A. Well, not consecutively.

Q. Yeah, consecutively, because the last money that was applied against the note was the 21st of July '52, and nothing at all was applied until when, December 11, 1953?

A. Yeah, that is agreed.

Q. And every one of those months payments had been made? A. That's right.

Q. And then following the holding of the payments as you did, commencing in August of '53 and continuing to do so until December the 10th of '53, commencing again on the first, the 13th day of January 1954 and from and after each month thereafter the payments were applied toward the satisfaction of the Kaye notes directly without having deposited them to the Kaye special account so actually at one time you testified that this Kaye special account which was set up on the 9th of July, '52, was done for a matter of record keeping, your conduct prior to the 9th of July indicates that it was not necessary and you evidently feel that it was, or is it true now or at any time did you not believe that that might have been a mistake?

A. If it had worked like it should have worked, it [182] would not have been a mistake, but unfortunately circumstances weren't such that it worked satisfactorily. Consequently we eliminated it at a later date.

Q. In fact, at least a portion of four thousand

(Testimony of Ralph C. Bailey.)

one hundred forty-four dollars, seventy-one cents went some place and was not applied against the notes? A. That's correct.

Q. And for that reason you held them again for awhile and then later applied the payments directly as they came to you?

A. That's correct. The reason we held them, if I recall correctly, after thinking about this for two days, it was felt that we did not want to apply any further payments to the notes either until we went into court or did not go into court, but after we held those funds in the bank account and we didn't get them, it is admitted that was a poor way to do it.

Q. In fact, when you did deposit it to the special account and thereby made them available to Mr. Kaye you acted contrary to the escrow instructions?

A. I still say yes and no on that for the simple reason of this, I think and I believe it is the bank prerogative to deposit those to accounts and come back and apply those payments. Of course, the funds were there, had been there, then we would have been within our legal right.

Q. Well, I know, Ralph, but let me say this you did [183] not obey the written word of the escrow instructions when you did not apply the proceeds?

A. We didn't get the job done. Yes, then we were not correct.

Mr. McNabb: Your Honor, I believe that all of

(Testimony of Ralph C. Bailey.)

the figures as set out in this Exhibit are entirely correct and state the question quite accurately to the court.

The Court: They may be admitted then.

Clerk of Court: Plaintiff's Exhibit "K".

(Plaintiff's Identification No. 12 was received in evidence as Plaintiff's Exhibit "K".)

Mr. McNabb: I have no further questions, Ralph.

Mr. Johnson: We have nothing further.

(Witness excused.)

The Court: How much time do you want for argument?

Mr. McNabb: Your Honor, Mr. Johnson and I had tentatively agreed on forty-five minutes per side.

Mr. Johnson: That is agreeable as far as I am concerned. I don't think we need that much.

The Court: Very well, proceed then.

(Thereupon, Mr. Johnson presented a closing argument to the Court in behalf of the plaintiff.)

(Thereupon, Mr. McNabb presented a closing argument to the Court in behalf of the defendants.)

Mr. Johnson: May we have a recess. [184]

The Court: Yes, we will take a ten minute recess.

Clerk of Court: Court is recessed for ten minutes.

(Thereupon, at 3:20 p.m., the court took a recess until 3:30 p.m., at which time it reconvened and the trial of this cause was resumed.)

The Court: Very well. Proceed, Mr. Johnson.

(Thereupon, Mr. Johnson presented a rebuttal argument to the Court in behalf of the plaintiff.)

The Court: Well, it is clear to me that the defendant, all of the defendants are entitled to prevail in this case. It is the law involved and which give the defendant the right to prevail in this case in the law with reference to estoppel, waiver, contract, and a third party contract and novation. All of them we pursued end up by giving such a situation as arises in this case by giving the defendant in this case a right to a verdict in judgment. I hold for the defendants all the way through and against the plaintiff. The attorneys for the defendants are charged with the duty of drawing up findings and conclusions of law and decree. They will do so accordingly.

(Thereupon, at 3:50 p.m., August 18, 1954 the trial of this cause was concluded.)

[Endorsed]: Filed February 5, 1955.

[Endorsed]: No. 14653. United States Court of Appeals for the Ninth Circuit. Bank of Fairbanks a corporation, Appellant, vs. A. L. Kaye, Jean Kaye and Josephine Boussard, Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Fourth Division.

Filed: February 11, 1955.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,653

BANK OF FAIRBANKS, an Alaskan Banking
Corporation, Appellant,

vs.

A. L. KAYE, JEAN KAYE and JOSEPHINE
BOUSSARD, Appellees.

STATEMENT OF POINTS

Pursuant to the provisions of Rule 17 (6) of this Court, the Appellant herewith states the points on which it intends to rely on this appeal, as follows:

I.

That the trial Court erred in denying the Appellant's motion for new trial. The motion for new trial appears at page 82 of the original certified record, and the order denying the motion appears at page 92. A minute order of denial appears at page 87 of the same record.

II.

That the judgment of the trial Court is contrary to the law and the evidence. The said judgment appears at page 78 to 79 of the original certified record.

III.

That the trial Court erred in making the following numbered Findings of Fact: XIV, XV, XVIII,

and XIX in that such Findings are contrary to the evidence. The Findings of Fact appear in the original certified record at pages 68 to 77.

IV.

That the trial Court erred in its Conclusions of Law in that the same are not based upon, nor do they follow from the Findings of Fact; and in that the same are contrary to the evidence adduced at the trial. Said Conclusions of Law appear at pages 76 and 77 of the original certified record.

MAURICE T. JOHNSON and
WILLIAM V. BOGGESS,

/s/ By MAURICE T. JOHNSON,
Appellant's Attorneys

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 25, 1955. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

DESIGNATION OF RECORD

Pursuant to the provisions of Rule 17 (6) of the rules of this Court, the Appellant herewith designates the following parts of the original certified record to be printed in the transcript of the record for the consideration of this appeal:

1. Complaint.
2. Answer and Affirmative Defenses of Defendant Bousard.

3. Answer of Defendants A. L. Kaye and Jean Kaye.

4. Reply to the Answer and Affirmative Defenses of Defendant Josephine Boussard.

5. Reply to the Answer of the Defendants A. L. Kaye and Jean Kaye.

6. Findings of Fact and Conclusions of Law.

7. Judgment.

8. Motion for New Trial.

9. Minute Order denying Motion for New Trial.

10. Notice of Appeal.

11. Supersedeas Bond.

12. Signed Order denying Motion for New Trial.

13. Signed Order extending Time to Docket Cause.

14. Designation of Contents of Record on Appeal.

15. Transcript of Testimony, separately bound, pages No. 1 to 186.

16. Statement of Points on Appeal.

17. This Designation of Record.

MAURICE T. JOHNSON and
WILLIAM V. BOGGESS,

/s/ By MAURICE T. JOHNSON,
Appellant's Attorneys

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 25, 1955. Paul P. O'Brien, Clerk.

